(24,521)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 777.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, BY H. M. BOSWORTH, AUDITOR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

	Original.	Print
Caption	1	1
Transcript from the circuit court of Franklin county	1	1
Pleas and caption	1	1
Petition	2	1
Answer	4	3
Demurrer to answer	10	6
Orders and judgment of circuit court	11	6
Judgment of Court of Appeals (first appeal)	11	7
Opinion of Court of Appeals on first appeal (Nunn, J.)	13	7
Response of Court of Appeals to petition for rehearing	23	12
Mandate of Court of Appeals	25	12
Amended answer	25	13
Demurrer to answer	35	19
Judgment of circuit court	36	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 19, 1915.

	Original.	Print
Opinion of Court of Appeals on second appeal (Carroll, J.)	38	20
Mandate and judgment of Court of Appeals	41	21
Petition for writ of error	42	22
Order allowing writ	44	23
Writ of error	45	23
Writ of error bond	47	25
Assignment of errors	48	26
Citation and service	53	28
Præcipe for record	54	28
Clerk's certificate	56	30

1 *Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, Kentucky, on the First Day of October, A. D.* 1914.

COMMONWEALTH OF KENTUCKY:

Court of Appeals.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Appellee.

Appeal from the Franklin Circuit Court.

Be it remembered that heretofore, to-wit, on August 26, 1913, a transcript of record was filed in the office of the Clerk of the Court of Appeals on the first appeal to said court in the above styled action, and afterwards on the 24th of March, 1914, a transcript of record on the second appeal in said case was filed in the Clerk's office as aforesaid.

The following portions of the records in the above appeals are ordered by the Schedule filed herein by the Plaintiff in Error on Writ of Error for the Supreme Court of the United States:

2 Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Plaintiff.
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Defendant.

Petition in Equity.

The plaintiff, H. M. Bosworth, states that he is the duly elected, qualified and acting Auditor of Public Accounts of the State of Kentucky.

He states that the Provident Savings Life Assurance Society is a corporation organized under the laws of the State of New York, with power among other things to write life insurance upon the lives of individuals; that upon the — day of —— said defendant made application to the Insurance Commissioner of the State of Kentucky for and was granted a license to do business in this State, and continued to do business and write life insurance in this State until the year 1907, at which time it voluntarily withdrew from the State of Kentucky and ceased making the statements to the Auditor of Public Accounts for deposits in the Insurance Department of the business done in this State annually after said time. That said

Company did, however, in 1907 file with the Auditor of Public Accounts for deposit in the Insurance Department of Kentucky, a statement showing the amount of premiums collected by it for the year 1906, which premiums amounted to $199,930.56, and it thereupon paid into the State Treasury the taxes due upon said premiums collected, viz:—$4,334.98.

The plaintiff states that during the year 1907-8-9-10 and 11, the said Provident Savings Life Assurance Society or the Postal Life Insurance Company, which Company reinsured the business of this defendant and assumed all of its liabilities, collected from
3 various policy holders premiums amounting to at least $1,000,000.00 upon business done in Kentucky by this defendant, but that this defendant and the Postal Life Insurance Company failed and refused to file with the Auditor of Public Accounts for deposit in the Insurance Department, a statement under oath of all premiums receipted for on the face of the policy for original insurance, and all renewal premiums received in cash or otherwise in this State or out of this State on business done in this State during the years ending on the 31st day of December, 1907; 31st day of December, 1908; 31st day of December, 1909, 31st day of December, 1910, and 31st day of December, 1911; nor has it ever paid into the State Treasury the tax of $2.00 upon each $100.00 of said premiums so collected for the years 1907-8-9-10 and 11.

The plaintiff states that he has no way of knowing just what the amount of the premiums collected by said Insurance Company for the said years upon business done in Kentucky is; that under the law of the State of Kentucky it was the duty of the defendant on the 31st day of December of each of said years, or within thirty days thereafter, to file such statement under oath with the Auditor of Public Accounts, and pay into the State Treasury a tax of 2% thereon; but that, as stated heretofore, said premiums amounted to at least $1,000,000.00 in the aggregate, or $20,000.00 yearly.

Wherefore, the plaintiff prays that the said defendant be required to answer and set out the amount of the premiums received by it during the years 1907-8-9-10 and 11 upon business done in Kentucky, and be required to pay into the State Treasury a tax of 2% thereon, and interest upon same from the time it was due viz: January 31st of each year; but upon failure to render such a statement, for a judgment for $20.000.00, with interest upon
4 $4.000.00 from January 31st, 1908, until paid; interest upon $4,000.00 from January 31st, 1909, until paid; interest upon $4,000.00 from January 31, 1910, until paid; interest upon $4,000.00 from January 31st, 1911, until paid; interest upon $4,000.00 from January 31st, 1912, until paid; for costs and all proper relief.

JAS. GARNETT,
Attorney General.
C. R. McDOWELL,
JOHN A. JUDY, *Att'ys.*

Thereupon, upon the 1st day of May, 1913, came defendant by counsel, and filed its answer herein. Said answer is in words and figures as follows, to-wit:

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Plaintiff.

vs.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Defendant.

Answer

Paragraph 1.

The defendant, Provident Savings Life Assurance Society, for answer to plaintiff's petition states as follows:

Denies that during the years 1907, 1908, 1909, 1910 and 1911, or during any of said years, the Provident Savings Life Assurance Society, or the Postal Life Insurance Company collected in Kentucky from various or any policy holders, premiums amounting to One Million ($1,000,000.00) Dollars, or any amount or collected at any place premiums in excess of Four Hundred
5 Thousand ($400,000.00) Dollars, for all of said years on policies written in Kentucky after January 1st, 1907, and denies that the defendant failed or refused to file with the Auditor of Public Accounts for deposit in the Insurance Department, a statement under oath of all premiums receipted for on the face of the policy for original insurance, or all renewal premiums received on business done in Kentucky during 1907 or 1908, or 1909 or 1910 or 1911 and denies that it or the Postal Life Insurance Company, during any of said years, did any business in Kentucky.

Denies that under the laws of the State of Kentucky it was the duty of the defendant on the 31st of December of each or any years named in the petition, or within thirty days thereafter, or at any time during any of said years, to file a statement under oath with the Auditor of Public Accounts or to pay into the State Treasury a tax of two per cent thereon, or any tax, and denies that the alleged premiums alleged to have been collected during the years 1907, 1908, 1909, 1910 and 1911, or any of said years, amounted to One Million ($1,000,000.00) Dollars in the aggregate, or Two Hundred Thousand ($200,000.00) Dollars yearly, or any amount.

Paragraph 2.

Further answering, defendant states that on or about February 12th, 1907, it paid to the State of Kentucky the sum of One Thousand Five Hundred and Sixty Nine Dollars and Six Cents ($1,569.06) on account of taxes on premium receipts and the said payment was in addition to the payment of Four Thousand Three Hundred and Thirty Four Dollars and Ninety-Eight Cents
6 ($4,334.98) referred to in plaintiff's petition, and said payments constituted the full amount of taxes due on all premiums collected prior to the time the defendant withdrew from Kentucky and ceased to do business therein.

Paragraph III.

Further answering, the defendant, Provident Savings Life Assurance Society, says that it is, and at all the times mentioned in the plaintiff's petition and for many years prior thereto it has been a corporation organized and existing under the laws of the State of New York and a non-resident of the *of the* State of Kentucky. On January 1st, 1907 the defendant withdrew from the State of Kentucky and ceased to do business therein and ceased to write further insurance in the State of Kentucky and revoked the designation of the Insurance Commissioner of the State of Kentucky as its agent for the service of process, and ceased to and did not thereafter write any insurance in the State of Kentucky or collect any premiums in the State of Kentucky, and did not, nor did the Postal Life Insurance Company, during any of the years 1907 or 1908 or 1909 or 1910 or 1911, collect any premiums in the State of Kentucky or transact any business therein. All premiums collected by it since January 1st, 1907 have been collected or received by it in the State of New York and outside the State of Kentucky, and it has written no policies in the State of Kentucky and has done no business in the State of Kentucky since January 1st, 1907, and the defendant did not, after January 1st, 1911, collect or receive any premiums at any place for the year 1911 or for any others years. The Postal Life Insurance Company did not, prior to January 1st,
1911, collect any premiums at any place on business written
7 by defendant in Kentucky and it has never done any business
in Kentucky, and after January 1st, 1911 collected no premiums in Kentucky.

Kentucky Statutes 4230 A which provides that an Insurance Company that has been authorized to transact business in the State of Kentucky shall continue to pay taxes on premiums collected outside of the State of Kentucky, even if it has voluntarily ceased to write insurance in the State of Kentucky, or has withdrawn therefrom, or its license has been cancelled, is a violation of the Constitution of the United States and especially the Fourteenth Amendment thereof, which *deprives* that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and to compel the Provident Savings Life Assurance Society to pay taxes to the State of Kentucky on premiums collected by it outside of the State of Kentucky since it withdrew from the State of Kentucky and ceased to write insurance and to do business therein, would be in violation of said Constitution of the United States and said Fourteenth Amendment thereof, and the defendant now pleads and relies upon the Constitution of the United States, and especially the Fourteenth Amendment thereof, in bar of this action.

Kentucky Statutes Section 4230 A, which provides that an insurance company that has been authorized to transact business in the State of Kentucky shall continue to make reports and to pay taxes on premiums collected outside of the State of Kentucky, even after it has withdrawn from the State of Kentucky and ceased to

write insurance therein, was enacted and approved on or
8 about March 15th, 1906 and became a law ninety days thereafter, and had not been enacted and was not a law at the time the defendant began doing business in Kentucky and was granted a license so to do.

At the time defendant began doing business in Kentucky and applied for a license so to do and was granted such license by the State of Kentucky and the Insurance Commissioner of Kentucky and accepted the provisions of the laws then in force in Kentucky, said Statute was not a law and was not a condition which it accepted as a condition of doing business in Kentucky and in less than a year after the enactment of said Statute the defendant withdrew from Kentucky and ceased to write insurance therein, and the said Statute is a violation of the Constitution of the United States, and especially Article 1, Section 10, Clause 1 thereof, which provides that no State shall pass any law impairing the obligations of contracts, and to compel the Provident Savings Life Assurance Society to pay taxes to the State of Kentucky since it withdrew from the State of Kentucky and ceased to do business therein, would be in violation of said Constitution of the United States and said Article 1 Section 10 Clause 1 thereof, and the defendant now pleads and relies upon the Constitution of the United States and especially Article 1 Section 10 Clause 1 thereof, in bar of this action.

Said Kentucky Statutes 4230 A is in violation of the Constitution of Kentucky, and especially the Nineteenth Section thereof which provides that no law impairing the obligation of contracts shall be enacted and is in violation of the Constitution of the State of Kentucky, Section 171, which provides that taxes shall be uni-
9 form upon all property subject to taxation within the territorial limits of the authority alleging the tax, and to compel the defendant to pay taxes upon premiums collected by it outside of the territorial limits of the State of Kentucky, would be compelling it to pay taxes upon property over which the State of Kentucky has no jurisdiction and would be in violation of said Constitution of the State of Kentucky, and defendant now pleads and relies upon said Constitution of the State of Kentucky.

Wherefore, Having fully answered, defendant prays to be hence dismissed with its costs herein expended.

KEITH L. BULLITT,
Attorney for Defendant.

Keith L. Bullitt says that he is one of the attorneys for the Provident Savings Life Assurance Society, and that said defendant is a corporation non-resident of the State of Kentucky and has no officer or agent residing in the State of Kentucky upon whom service of process might be lawfully had, and the affiant believes that the statements contained in the foregoing answer are true.

KEITH L. BULLITT.

Subscribed and sworn to before me by Keith L. Bullitt this 1st day of May 1913.

J. H. JACKSON,
Notary Public, Franklin Co., Ky.

10 At a Court held on 1st day of May 1913, came the plaintiff by counsel and filed a demurrer to the answer of the Provident Savings Life Assurance Society, defendant, herein. Said Demurrer is as follows, to-wit:

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Defendant.

Demurrer.

Comes the plaintiff and demurs to each paragraph and the defendant's answer herein, separately, because they nor either of them state facts sufficient to constitute a traverse of, an estoppel against or an avoidance of the cause of action set up in the petition.

JAS. GARNETT,
C. R. McDOWELL,
JOHN A. JUDY,
Att'ys for Plaintiff.

Franklin Circuit Court, April Term, 22nd Day, 1st Day of May, 1913.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Defendant.

Order.

11 This cause being submitted to the Court upon the motion of the defendant to quash the return upon the summons herein and the Court advised overrules said motion to which the defendant excepts.

Thereupon defendant filed its answer herein, and thereupon comes plaintiff and files a demurrer to the answer herein.

Order.

This cause having been submitted to the Court upon the demurrer of the plaintiff to each paragraph of the defendants' answer separately, and the Court advised overrules said demurrer; thereupon the defendant asked that the demurrer relate back to the petition herein, and the Court advised, sustains said motion, and the demurrer to said petition is sustained, and the plaintiff declines to plead further: and thereupon the Court dismissed the petition of the plaintiff, to all of which the plaintiff objects and excepts and prays an appeal to the Court of Appeals, which is granted.

The following orders and judgments were entered in the Court of Appeals of Kentucky, on the 9th day of October, A. D. 1913.

COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Appellant,
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellee.

Appeal from the Franklin Circuit Court.

The court being sufficiently advised it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded with direction to the lower court to ascer-
12 tain the amount of premiums received and render a judgment therefor. Which is ordered to be certified to said court.

It is further considered that appellant recover of appellee its cost herein expended.

Opinion delivered by said court on said October 9, 1913, is as follows:

13 Court of Appeals of Kentucky, October 9, 1913.

COMMONWEALTH OF KENTUCKY, by &c., Appellants,
v.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellee.

Appeal from Franklin Circuit Court.

Opinion of the Court by Judge Nunn, Reversing.

This is an appeal by the Commonwealth of Kentucky from a judgment of the Franklin circuit court overruling a demurrer to the answer of appellee, and carrying it back to the petition, sustaining and dismissing it. The petition was based upon section 4226 of the General Statutes which is as follows:

"Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this State, but doing business therein, shall, on the first day of Janu-
14 ary in each year, or within thirty days thereafter, return to the Auditor of Public Accounts for deposit in the insurance department a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the 31st day of December, and no deduction shall be made for dividends, or since the last returns were made, on all premium receipts which shall include single premiums, annuity premiums, and premiums received for renewal, revival or reinstatement of policies, annual and periodical premiums, dividends applied for premiums and additions, and

all other premium payments received during the preceding year on all policies which have been written in, or on, the lives of residents of this State, or out of this State on business done in this State, and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained."

The Legislature passed an Act in 1906, which took effect in June 1906, declaratory of this Act, and fixing a penalty for the violation thereof, which is as follows: (This is now Section 4230a, sub-section 2, Kentucky Statutes.)

15 "Any insurance company that has been authorized to transact business in this State shall continue to make the reports required herein as long as it collects any premiums as provided for herein, and shall pay taxes thereon, even after it has voluntarily ceased to write insurance in the State or has withdrawn therefrom or its license suspended or revoked by the Insurance Commissioner, and for failure to make report of the premiums collected and pay the taxes due thereon, shall be fined five hundred dollars for such offense."

The appellee filed an affidavit, and made a motion to quash the service of process which was served on the Insurance Commissioner as required by law. The court refused to quash the service and appellee excepted.

The court was correct in this. See Home Benefit Society v. Muehl, 22 K. L. R. 1378; Germania Insurance Co. v. Ashby, 23 K. L. H. 1564.

A foreign insurance company upon its entry into the State to do business, and after filing its written consent that service upon the Insurance Commissioner should constitute due service in all actions against it, cannot revoke that authority so long as it has liabilities in the State. It cannot cease to do business in the State and withdraw all of its agents, and revoke the authority to serve process upon the Insurance Commissioner so long as they have existing policies in the State.

16 Where an insurance company goes into a state and makes contracts of insurance, it does not cease to do business simply because it withdraws its agents and solicits no new business. See Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573. Also Conn. Mut. Life Ins. Co. v. Spartley, 172 U. S. 602. In the last named case the court said:

"We think the evidence in this case shows that the company was doing business within the State at the time of this service of process. From 1870 until 1894, it had done an active business throughout the State by its agents therein, and had issued policies of insurance upon the lives of citizens of the State. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the State, was simply a recall of its agents doing business therein, the giving of a notice to the state insurance commissioner, and a refusal to take any new risks or to issue any new policies within the State. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to

pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent * * * It cannot be said with truth, as we think, that an insurance company does no business within a State unless it have agents therein who are continuously seeking new risks and in its continuing to issue new policies upon such risks. Having 'succeeded in taking risks
17 in the State through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policyholders to an agent residing in another State, and who was once the agent in the State where the policy holders resided. This action on the part of the company constitutes doing business within the State, so far as is necessary, within the meaning of the law upon this subject.'

The appellee seeks to avoid liability for the tax for the reason that on January 1st, 1907, it withdrew from the State of Kentucky, and ceased to do business therein, and ceased to write further insurance in the State, and revoked the designation of the insurance commissioner of the State of Kentucky as its agent for the service of process, and ceased to, and did not thereafter write any insurance in the State of Kentucky, or collect any premiums, and did not, nor did the Postal Life Insurance Company, its transferee, during any of the years, collect any premiums in the State of Kentucky, or transact any business therein, and all premiums collected by it since January 1st, 1907, have been collected, or received by it in the State of New York, and outside of the State of Kentucky.

18 Section 4226 of the Kentucky Statutes was a part of the law of this Commonwealth when the appellee entered the State and obtained therefrom its license to do business as an insurance company, and this section became a part of the contract between the insurance company and the State, and the appellee impliedly agreed that all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State on all policies which have been written in, or on, the lives of residents of this State, or out of this State on business done in this State shall be subject to taxation. That is, it agreed to pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained.

The question is, did the insurance company have the right and power to revoke this agreement as it attempted to do the first of January 1907? It clearly did not.

Counsel for appellee mainly rests its case upon the definition of "what is doing business?" Is a life insurance company doing business in a state only so long as it is writing new business? If this is true, then the appellant has no case. However, counsel for appellant insists that an insurance company is doing business in this

State in the meaning of the statute so long as it is insuring
19 the lives of residents of this State and furnishing protection to the beneficiaries named in the policies against loss from death of the insured, this being the chief business for which insurance companies are organized, and we are unable to see how the court held, that a company collecting premiums on policies issued in this State, when it was authorized to do business in this State, can be said "not to be doing business," when it was still insuring those same lives and collecting the premiums upon the policies.

The Supreme Court of Pennsylvania in a recent case of the Commonwealth v. Equitable Life Assurance Society, 86 Atl. Rep., 787, passed upon this identical question, Pennsylvania having a s-milar statute to our own. In that case the insurance company reported and paid the tax on all premiums paid and received on policies of insurance issued in the State, but on a great many policies the premiums were paid at the home office of the company in New York, and at other agencies outside of that State, for which the insurance company deducted and refused to pay the State of Pennsylvania any tax thereon, and the court said:

"In order to determine the question in controversy we must ascertain the source of the premiums which were paid to agencies outside the State. If they were received by the society from business done within the commonwealth, then they were subject to the tax. If they did not come from such business, they were not subject to the tax. What, then, is the meaning of the words 'business
20 done within this commonwealth' as used in the statute taxing gross premiums of every character and description, received from such business? Manifestly the business in which the society is engaged is that of insuring lives; that is, in furnishing protection to the beneficiaries named in the policies against loss from the death of the insured, to the amount designated in the policy. Furnishing this protection is the business to be done by the society within this commonwealth, as contemplated by the statute, which fixes the amount of the tax which it, as an insurance company, organized under the laws of another state, is to pay for the privilege of entry and doing this business within this commonwealth, and with our people, its residents. The court below seems to have unduly narrowed its inquiry, and contented itself with asking whether the mere receipt of premiums at an outside office was doing business within this commonwealth. Certainly not, if that was all there was to it. But the answer to that question is not at all decisive of the real inquiry here. The defendant society does not exist merely for the collection of premiums; that is a mere incident to the great and beneficial purpose for which it exists. When it comes within our borders to do business, it renders a service; it furnishes protection and indemnity to its beneficiaries, residents of the state of Pennsylvania. That is the business which it
21 does in Pennsylvania, and that is the purpose for which it seeks and is granted permission to enter. Furnishing that service, that insurance against loss, it makes a proper charge to cover

the cost of the service which it renders, and that charge is the premium.

If the society was merely engaged in collecting premiums, without regard to the business or service for which those premiums were paid, there would be force in the suggestion that premiums collected outside of the state do not constitute doing business within the state. But when we reflect that the tax is placed upon the amount of the premium merely as a measure of the volume of insurance business done within the state, it is apparent that determining the place where the premium is received is not the proper test to apply in order to ascertain what that business was, or in what it consisted."

The remaining question is did the Provident Savings Life Assurance Society relieve itself of this tax by transferring its risks on these policies in Kentucky to the Postal Life Insurance Company in 1911, the Postal Company not being authorized to do business
22 in Kentucky? Section 699 of the Statute is sufficient to answer this question, that section being in the statute at the time the Provident Savings Life Assurance Society entered Kentucky, and was a part of its implied contract upon being permitted to do any business in this State:

"No credit of any kind shall be allowed or given as reduction of liabilities to any company transacting business in this State, for re-insurance made in companies not authorized to issue policies herein; and it shall be the duty of the Insurance Commissioner to require schedules of re-insurances to be filed by each company with its annual statement made to his department."

Under this statute we hold that the transfer did not relieve it from liability for the tax.

It is, therefore, the opinion of this court that the case be reversed, and remanded with directions to the lower court to ascertain the amount of premiums received, and render a judgment therefor.

James Garnett, Attorney General;
C. R. McDowell, Danville, Ky.;
John A. Judy, Mt. Sterling, Ky.,
For Appellant.

Wm. Marshall Bullitt, Louisville, Ky.;
Clarence C. Smith, " "
Keith L. Bullitt, " "
Bruce & Bullitt, " "
For Appellee.

25 The following modified opinion was delivered by the Court of Appeals November 13, 1913:

Court of Appeals of Kentucky.

November 13, 1913.

COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, etc., Appellants.
v.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellee.

Appeal from Franklin Circuit Court.

Response to Petition for Rehearing and Modification of Former Opinion by Judge Hannah.

Appellee asks a modification of the opinion herein (155 Ky. 197) eliminating therefrom the imperative direction that the lower court render judgment against it for the premiums received. This language having been inadvertently used, the petition is granted; the opinion is modified by the withdrawal of said direction; and the case is remanded with direction to sustain the demurrer of the Commonwealth to the answer, and for further proceedings consistent with the opinion.

24 James Garnett, Attorney General, Frankfort, Ky.;
C. R. McDowell, Danville, Ky.;
John A. Judy, Mt. Sterling, Ky.;
For Appellant.

Wm. Marshall Bullitt, Louisville,
Clarence C. Smith, "
Keith L. Bullitt, "
Bruce & Bullitt, "
For Appellee.

[Endorsed:] Oct. 9, '13. Com. of Ky. vs. President Savings Life Assurance Society.

25 The following is a copy of the mandate issued December 19, 1913, and filed in the lower Court:

The Court of Appeals, the Commonwealth of Kentucky.

Oct. 9th & Nov. 13th, 1913.

COMMONWEALTH OF KY., by etc., Appellant,
against
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellee.

Appeal from a Judgment of the Franklin Circuit Court.

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded, with directions to sustain the demurrer of the Commonwealth to the answer and for further proceedings consistent with the opinion herein, and modified opinion.

Which is ordered to be certified to said Court.

ROBERT L. GREENE, *C. C. A.*
By A. ADDAMS, *D. C.*

A Copy. Attest:
Issued Dec. 19th, 1913.

Amended answer filed January 31, 1914, is as follows:

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Plaintiff,
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Defendant.

Amended Answer.

The defendant, Provident Savings Life Assurance Society,
26 by leave of court, and pursuant to the opinion of the Court of Appeals rendered herein on the 9th day of October, 1913, amends its answer so that the same as amended shall read as follows:

Paragraph 1.

Denies that during the year 1907, or the year 1908, or the year 1909, or the year 1910, or the year 1911, or during all or any of said years, the defendant, Provident Savings Life Assurance Society, of the Postal Life Insurance Company, collected from various policy holders upon business done in Kentucky by this defendant, premiums amounting to One Million ($1,000,000.00) Dollars, or any amount in excess of One Hundred and Forty Five Thousand Dollars, Two Hundred and Forty Eight Dollars and Ninety Eight Cents ($145,248.98) for the year 1907, or any amount in excess of One Hundred and Twenty Thousand Eight Hundred and Ninety Seven Dollars and Ten Cents ($120,897.10) for the year 1908, or any amount in excess of One Hundred and Four Thousand Nine Hundred and Seventy Four Dollars and Thirty Four Cents ($104,974.34) for the year 1909, or any amount in excess of Eighty Eight Thousand Five Hundred and Seventy One Dollars and Thirty Seven Cents ($88,571.37) for the year 1910, or any amount in excess of Seventy Four Thousand Seven Hundred and Twenty Dollars and Sixty Five Cents ($74,720.65) for the year 1911 collected by Postal Life Insurance Company, as hereinafter stated, and denies that this defendant, or the Postal Life Insurance Company failed or refused to file with the Auditor of Public Accounts for deposit in the
27 Insurance Department, a statement under oath of all premiums receipted for on the face of the policy for original

insurance, or of renewal premiums received in cash or otherwise in this State or out of this State on business done in this State during all or any of the years after January 1st 1907; but admits that it has never paid into the State Treasury a tax of Two ($2.00) Dollars upon each One Hundred ($100.00) Dollars of premiums which, since January 1st, 1907, it has collected on policies written in Kentucky prior to that date.

Denies that it was the duty of this defendant, on the 31st day of December of each or any of said years, or at any time, to file a statement under oath with the Auditor of Public Accounts, or to pay into the State Treasury a tax of two per cent upon any premiums received after January 1st, 1907.

Paragraph II.

Further answering, defendant, Provident Savings Life Assurance Society, hereinafter called the Provident Savings, states as follows:

It is, and at all the times mentioned in the plaintiff's petition, and for many years prior thereto has been, a corporation organized and existing under the laws of the State of New York and a non-resident of the State of Kentucky.

For many years prior to January 1st 1907 the Provident Savings was engaged in the business of insuring lives of persons in Kentucky and in other states, and it solicited insurance in Kentucky
28 upon the lives of persons in Kentucky, transmitted the applications to its Home Office in New York, where it either accepted or rejected them, and if it accepted them it forwarded the policies by mail to its agents in Kentucky, who delivered them to the applicants therefor, and such agents received the initial premiums thereon. Subsequent premiums were paid by the policy holders to the agents of the Provident Savings in Kentucky, who remitted the premiums so paid to the Home Office in New York.

All of the policies of insurance that have ever been written by the Provident Savings upon the lives of persons in Kentucky contained provisions that the premiums were payable by the policy holders at the Home Office in New York, and that the face of the policies, or other benefits thereon, when payable by the Company, were payable by it at its Home Office in New York, and that all obligations of the Company under such policies were to be performed at its Home Office in New York.

Prior to January 1st 1907 the General Assembly of Kentucky had enacted the following Statute known as Kentucky Statute Section 4226, which is, and since prior to January 1st 1907 has been in effect in the State of Kentucky, to-wit:

"(1) Reports and taxes. Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this state, but doing business therein, shall, on the first day of January in each year, or within thirty days thereafter, return to the Auditor of Public Accounts for deposit in the insurance department a statement under oath of all the premiums
29 receipted for on the — of the policy for original insurance and all renewal premiums received in cash or otherwise in

this state, or out of this State on business done in this state during the year ending the 31st day of December, and no deductions shall be made for dividends, or since the last returns were made, on all premium receipts, which shall include single premiums, annuity premiums, and premiums received fore renewal, revival or reinstatement of policies, annua-, and periodical premiums, dividends applied for premiums and additions, and all other premiums payments received during the preceding year on all policies which have been written in, or on, the lives of residents of this State, or out of this State on business done in this State, and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained. Every life insurance company not organized under the laws of this State, but doing business therein on what is known as the industrial insurance plan, whereby weekly premiums are collected, shall at the same time make a return to the Auditor of Public Accounts for deposit in the Insurance Department, a statement under oath of all premiums received on insurance written exclusively on the industrial plan, and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained. Any insurance company mentioned in this section doing insurance business other than on the industrial plan, shall make reports and pay into the State Treasury the taxes due thereon under each report."

The General Assembly of the State of Kentucky passed an act which became a law on June 15th, 1906, which is known as Kentucky Statute Section 4230 A, and which provides as follows, towit:

"(2) Reports and taxes after company has withdrawn from State. Any insurance company that has been authorized to transact business in this State shall continue to make the reports required herein as long as it collects any premiums as provided for herein, and shall pay taxes thereon, even after it has voluntarily ceased to write insurance in the State or has withdrawn therefrom, or its license suspended or revoked by the Insurance Commissioner, and for failure to report of the premiums collected and pay the taxes due therefrom, shall be fined five hundred dollars for such offense."

30 Said Act, Kentucky Statutes Sec. 4230 A, was not a law at the time that the defendant began doing business in Kentucky and was granted a license so to do, and at the time the defendant began doing business in Kentucky and applied for a license so to do and was granted such license and accepted the provisions of the laws then in force in Kentucky, said Statute was not a law and was not a condition which the defendant accepted as a condition of doing business in Kentucky. After the passage of said Act the defendant did not renew its license, but immediately after the passage of said Act withdrew from the State of Kentucky and ceased to write insurance therein.

On January 1st 1907 the defendant withdrew from the State of Kentucky and withdrew all of its agents therefrom and ceased to do business therein and ceased to solicit or write further insurance in the State of Kentucky and closed all of its offices in the State of Kentucky and revoked the designation of the Insurance Commis-

sioner of the State of Kentucky as its agents for the service of process, and did not thereafter maintain any offices or agents in the State of Kentucky or solicit or write any insurance in Kentucky or collect any premiums therein, and it did everything possible to completely sever all relations with and terminate all connections with the State of Kentucky and the transaction of any business therein.

On January 1st 1911 the Postal Life Insurance Company, a corporation organized under the laws of the State of New York and a non-resident of the State of Kentucky, by contract executed
31 in the State of New York reinsured all of the business of the Provident Savings, including the policies theretofore written in Kentucky by the Provident Savings and assumed and agreed to perform all the obligations of the Provident Savings with respect to such policies.

Between January 1st 1907 and January 1st 1911 all premiums paid to the Provident Savings by persons upon policies theretofore issued in Kentucky or issued upon the lives of persons in Kentucky, were paid to the Provident Savings at its Home Office in New York City by such persons mailing through the United States mail to such Home office of the Provident Savings in New York the amount due for such premiums and at no time after January 1st 1907 did the Provident Savings receive any money in the State of Kentucky or do any act whatever therein, and after January 1st 1911, the date of said reinsurance, the Provident Savings did not receive any premiums anywhere from any persons holding policies issued in Kentucky.

Before January 1st 1911 the Postal Life Insurance Company did not collect any premiums anywhere upon any policies theretofore written by the Provident Savings. At no time has the Postal Life Insurance Company had any office or agents in the State of Kentucky or solicited or written any business therein or collected any premiums in the State of Kentucky, or procured a license to do business therein, but after January 1st 1911 all premiums upon policies theretofore issued in Kentucky by the Provident Savings were paid to the Postal Life Insurance Company at its Home Office
32 in New York City by such persons mailing through the United States mail to such Home Office of the Postal Life Insurance Company in New York City the amount of money due for such premiums.

Kentucky Statutes Sec. 4230 A. hereinbefore quoted, which provides that an Insurance Company that has been authorized to transact business in the State of Kentucky shall continue to pay taxes on premiums collected outside of the State of Kentucky or has withdrawn therefrom or its license has been cancelled, is in violation of the Constitution of the United States and especially the Fourteenth Amendment thereof and the Tenth Section of Article 1 thereof, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws nor to pass any law impairing the obligation of contract, and to compel the Provident Savings to pay taxes to the State of Kentucky on pre-

miums collected by it outside of the State of Kentucky and at its Home Office in the State of New York since it withdrew from the State of Kentucky and ceased to write or solicit insurance therein or to maintain any offices or agents therein, or to do business therein, or to compel the Provident Savings to pay taxes to the State of Kentucky on premiums not collected by it since January 1st, 1911, but collected outside the State of Kentucky by the Postal Life Insurance Company would deprive this defendant of its property without due process of law and would deny to the defendant the equal protection of the laws in violation of the Constitution of the United States and the Fourteenth Amendment thereof, and
33 would impair the obligation of its contract with the State of Kentucky in violation of the Tenth Section of Article 1 of said Constitution, and the defendant now especially pleads and relies upon the Constitution of the United States and especially the Fourteenth Amendment thereof and the Tenth Section of Article I thereof in bar of this action.

Said Kentucky Statute Section 4230 A is in violation of the Constitution of Kentucky and especially the Nineteenth Section thereof, which provides that no law impairing the obligation of a contract shall be enacted and is in violation of the Constitution of the State of Kentucky, and especially Section 171 which provides that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority imposing the tax, and to compel the defendant to pay taxes upon premiums collected by it outside the territorial limits of the State of Kentucky would be compelling it to pay taxes upon the property over which the State of Kentucky has no jurisdiction, and would be violating the contract entered into between the defendant and the State of Kentucky at the time the defendant entered the State of Kentucky and was granted a license to do business therein, and the defendant now relies upon said Constitution of the State of Kentucky and especially Sections 19 and 171 thereof, as well as upon the Constitution of the United States.

The decision of the Court of Appeals of Kentucky rendered on the 9th day of October 1913 in the case entitled Commonwealth of Kentucky by H. M. Bosworth, Auditor vs. Provident Savings Life Assurance Society, reported in 155 Ky. 197, that the receipt during the years 1907, 1908, 1909, and 1910 by the Provident Sav-
34 ings and the receipt during the year 1911 by the Postal Life Insurance Company, or premiums in the City of New York at their respective home offices, received there through the United States mails from policy holders living in Kentucky, such premiums being upon policies written prior to January 1st 1907, is doing business in Kentucky so as to subject the Provident Savings to the taxing statutes of Kentucky, and especially so as to subject the Provident Savings to liability for taxes under said Section 4226 Kentucky Statutes, and so as to make said section 4226 Kentucky Statutes applicable to the Provident Savings and to the Postal Life Insurance Company, and Kentucky Statutes Section 4226 as so construed are

and each of them is in violation of the Constitution of the United States; and this Statute of the State of Kentucky which thus compels the defendant to pay taxes on account of such premiums so received, deprives the defendant of its property without due process of law and impairs the obligation of the contract between it and the State of Kentucky made at the time that the defendant entered the State of Kentucky and was granted a license to do business therein, and denies to defendant the equal protection of the laws in violation of the Constitution of the United States, and especially the Fourteenth Amendment thereof and the Tenth Section of Article 1 thereof, and the defendant now specially pleads and relies upon the Constitution of the United States and especially the Fourteenth Amendment thereof and the Tenth Section of Article 1 thereof, which provides that no State shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, nor
35 pass any law impairing the obligation of contract.

Paragraph III.

Since January 1st, 1907, no insurance has been written in Kentucky by the Provident Savings Life Assurance Society or by the Postal Life Insurance Company, and since January 1st, 1907, the only premiums that have been received by the Provident Savings Life Assurance Society have been received by it outside of the State of Kentucky, and the amounts are as follows:

Premiums collected during			1907	$145,248.98
"	"	"	1908	120,897.10
"	"	"	1909	104,974.34
"	"	"	1910	88,571.37

The only premiums collected by the Postal Life Insurance Company were collected by it outside of the State of Kentucky and are as follows:

Premiums collected during 1911	$74,720.00

Wherefore, having fully answered the defendant prays to be hence dismissed with its costs herein expended.

KEITH L. BULLITT,
Att'y for Defendant.

The following is the demurrer filed January 31, 1914:

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Plaintiff,
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Defendant.

Demurrer.

Comes the plaintiff and demurs to the second paragraph of the Amended Answer of the Defendants herein, because the same
36 does not state facts sufficient to constitute or support a defense of the cause of action set up in the Petition.

The following is the judgment of the Circuit Court entered on the 31st day of January, 1914:

COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Plaintiff,
vs.
PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Defendant.

Judgment.

The mandate of the Court of Appeals having been filed herein directing this court to set aside the judgment entered herein on the 1st day of May, 1913, it is now ordered that said judgment be, and it hereby is, set aside, and it is further ordered that the demurrer of the defendant to the plaintiff's petition be, and it hereby is, overruled, and the demurrer of the plaintiff to the answer and each paragraph thereof, filed herein by the defendant, be, and it hereby is sustained and the defendant is given leave to amend.

Then came the defendant, Provident Savings Life Assurance Society, and filed its amended answer herein:

Then came the plaintiff and filed its general demurrer to paragraph two of the defendant's answer, and the court being advised it is ordered that said demurrer be, and it hereby is sus-
37 tained, and the defendant declining to plead further, and the case being submitted to the court for judgment upon the pleadings, it is now further ordered and adjudged as follows:

The plaintiff do recover of the defendant the sum of $2004.97, with interest at the rate of six per cent per annum from February 1st, 1908, being two per cent upon the premiums collected during the year 1907, and do recover the further sum of $2417.94, with interest at the rate of six per cent per annum from February 1st, 1909, being two per cent upon the premiums collected during the year 1908, and do recover the further sum of $2099.48, with interest at the rate of six per cent per annum from February 1st, 1910, being two per cent upon the premiums collected during the year 1901 and do recover the further sum of $1771.42, with interest at the rate of

six per cent per annum from February 1st, 1911, being two per cent upon the premiums collected during the year 1910 and do recover the further sum of $1494.41 with interest at six per cent per annum from February 1st, 1912, being two per cent upon the premiums collected during the year 1911 by the Postal Life Insurance Company, the reinsurer of the Provident Savings Life Assurance Society to all of which defendant objects and excepts and prays an appeal to the Court of Appeals, which is granted.

The following is the opinion of the Court of Appeals delivered in this cause October 1, 1914, affirming the above judgment:

38 Court of Appeals of Kentucky.

October 1, 1914.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Franklin Circuit Court.

Opinion of the Court by Judge Carroll, Affirming.

This is the second appeal in this case. The opinion on the first appeal may be found in 155 Ky., 197. On a return of the case after its reversal by this court, the appellant filed an answer in which it averred that it was a foreign corporation, organized under the laws of the State of New York, and that on January 1, 1907, it ceased to do business in the State of Kentucky and withdrew from the state. That on January 1, 1911, the Postal Life Insurance Co., a foreign corporation organized under the laws of the state of New York, reinsured all of the business of the appellant written in Kentucky and agreed to perform all of the obligations of the company in

39 respect to policies issued in Kentucky.

That between January 1, 1907, and January 1, 1911, all premiums paid to appellant by persons on policies theretofore issued in Kentucky were paid to it at its home office in New York by such persons mailing to it at such office the premiums. But after January 1, 1911, all premiums accruing on policies written by it while it was doing business in this state were paid to the Postal Life Insurance Company, which company at no time had an office or agents in this state and did not solicit or write any business therein, and the premiums paid to it on account of its reinsurance of the business of appellant were paid by the insured mailing the premiums to it at its home office in New York. It further averred that sections 4226 and 4230a of the Kentucky Statutes, as construed by this court in the former opinion, which held that notwithstanding the fact that appellant ceased to do business in the state in the manner stated, it was liable for the tax, under these sections, violated the 14th amendment to the Constitution of the United States.

To this answer a general demurrer was sustained and judgment entered against the appellant for the amount of tax due the state for the years 1908, 1909, 1910, 1911 and 1912. To this judgment the appellant excepted and prosecuted its appeal to this court.

40 It does not seem necessary that we should write an extended opinion in this case, as the questions involved have been determined by this court adversely to the contention of appellant in Com. v. Provident Savings Life Assurance Society, 155 Ky., 197; Com. v. Illinois Life Insurance Co., 159 Ky., 589, and Com. v. Washington Life Ins. Co., 159 Ky., 581.

If it should be said that the question as to the liability of the appellant for the tax on the premiums collected by the Postal Life Insurance Company was not expressly decided in these cases, then we have no doubt that it is liable for the tax on these premiums to the same extent as if the reinsurance had not been affected and the premiums were paid directly to it. A foreign insurance company doing business in this state will not be permitted to escape the payment of taxes by reinsuring its policy holders in another company that it avers has never been authorized to do and has not any business in this state.

Being further of the opinion that the sections of the statute referred to do not violate the 14th Amendment to the Constitution of the United States, the judgment appealed from is affirmed.

Wm. Marshall Bullitt, Louisville, Ky.
Clarence C. Smith, "
Bruce & Bullitt, "
Keith L. Bullitt,
For appellant.

James Garnett, Att'y. Gen'l. Frankfort, Ky.
John A. Judy, Mt. Sterling, Ky.
C. R. McDowell, Danville, Ky.
For Appellee.

[Endorsed:] Oct. 1, '14. Provident Savings Life A. Soc. v. Com.

41 The following is a copy of the mandate and judgment of the Court of Appeals entered on October 1, 1914:

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Appellee,

Appeal from the Franklin Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed. Which is ordered to be certified to said court.

On the 22nd day of December, 1914, the following Petition for

Writ of Error and order allowing same together with the Writ of Error, were filed in the Clerk's office of said Court of Appeals:

42 In the Court of Appeals of the State of Kentucky, September Term, 1914.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Appellee.

Appeal from Franklin Circuit Court.

Petition for Writ of Error.

To the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of the State of Kentucky:

The Provident Savings Life Assurance Society, Appellant in the above styled cause, respectfully represents that:

It is a citizen of the United States of America, and on October 1st 1914 the Court of Appeals of the State of Kentucky, which is the highest court of that State in which a decision in this suit could be had, rendered and made a final judgment or decree herein in favor of the appellee, Commonwealth of Kentucky By H. M. Bosworth, Auditor, and against the appellant, Provident Savings Life Assurance Society, in which final judgment or decree certain errors were committed to the prejudice of this appellant, as will appear more in detail from the assignment of errors which is filed with this petition.

In said suit there was drawn in question the validity of a statute of, and an authority exercised under, the State of Kentucky, and of the construction placed upon said statute by the Court
43 of Appeals of the State of Kentucky on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity; and a right and priviledge was claimed under the Constitution and statutes of the United States and the decision was against the right and privilege specially set up and claimed by the appellant under such Constitution and statutes.

Wherefore, the appellant, Provident Savings Life Assurance Society, prays that a writ of error from the Supreme Court of the United States be allowed and may issue to the Court of Appeals of the State of Kentucky for the correction of the errors so complained of, and a reversal of the said final judgment or decree; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, citation be granted and signed, and that the bond herewith presented be approved.

KEITH L. BULLITT,
Counsel for Petitioner, Provident Savings Life Assurance Society.

The writ of error as prayed for in the foregoing petition is hereby allowed this 22nd day of December 1914, and the bond for all costs is fixed at the sum of $500.00 and the same being tendered herewith is hereby approved.

Dated at Frankfort, Kentucky, this 22 day of Dec'r 1914.

J. P. HOBSON,
Chief Justice of the Court of Appeals of the State of Kentucky.

Filed Dec. 22, 1914. Rob't L. Greene, C. C. A.

44 In the Court of Appeals of the State of Kentucky, September Term, 1914.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Appellee.

Order.

The above entitled matter coming on to be heard upon the petition of the Provident Savings Life Assurance Society for a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter;

It is now ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby approved.

J. P. HOBSON,
Chief Justice of the Court of Appeals of the State of Kentucky.

Dec. 22, 1914.

Filed Dec. 22, 1914. Robt. L. Greene, C. C. A.

45 UNITED STATES OF AMERICA,
Eastern District of Kentucky,
Sixth Judicial Circuit, ss:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of Kentucky, before you or some of you, being the highest court of law or equity of the said State in which a decision

could be had in the said suit between the Provident Savings Life Assurance Society and the Commonwealth of Kentucky By H. M. Bosworth, Auditor, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath occurred to the great damage of the said Provident Savings Life Assurance Society, as by its complaint appears, we being willing that error, if any hath been done, should be duly corrected and full
46 and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 20th day of January, 1915, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 22nd day of December in the year of our Lord One Thousand Nine Hundred and Fourteen.

JOHN W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky, at Frankfort,
[SEAL.] By CHAS. N. WIARD, *D. C.*

The above writ is hereby allowed.

J. P. HOBSON,
Chief Justice of the Court of Appeals of the State of Kentucky.

Filed Dec. 22, 1914. Robt. L. Greene, C. C. A.

47 Also on the same day, to-wit, December 22, 1914, the Plaintiff in Error filed in said Clerk's office, its Writ of Error Bond, in words and figures following, to-wit:

In the Court of Appeals of the State of Kentucky, September Term, 1914.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Appellee.

Know all men by these presents that we, Provident Savings Life Assurance Society, as principal, and Keith L. Bullitt as surety, are held and firmly bound unto the Commonwealth of Kentucky By H. M. Bosworth, Auditor, in the sum of $500.00 to be paid to the said obligee, its successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves and our assigns by these preesnts.

Sealed with our seals and dated this 22 day of Dec'r. 1914.

Whereas the above named Provident Savings Life Assurance Society hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

Now, therefore, the condition of this obligation is such, that if the above named Provident Savings Life Assurance Society shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall
48 be void; otherwise to remain in full force and effect.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY,
By KEITH L. BULLITT, *Att'y.*
KEITH L. BULLITT, *Surety.*

The above bond has this day been examined, and it and the surety thereon approved this 22 day of Dec'r 1914.

J. P. HOBSON,
Chief Justice of the Court of Appeals of the State of Kentucky.

Filed Dec. 22, 1914. Robt. L. Greene, C. C. A.

Also on the same day, December 22, 1914, the Plaintiff in Error filed in said Clerk's office its Assignment of Errors, which is in words and figures following, to-wit:

In the Court of Appeals of the State of Kentucky, September Term, 1914.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Appellee.

Assignment of Errors.

49 Now comes the Provident Savings Life Assurance Society, appellant herein, (hereinafter called the plaintiff in error) by Keith L. Bullitt, its counsel, and says that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky, the same being the highest court of that State in the above entitled cause, there is manifest error committed against the just rights of said plaintiff in error, and now for such error it assigns the following:

1. The court erred in holding that Section 4230A Kentucky Statutes is valid and not repugnant to the Constitution and laws of the United States, and particularly that it is not in conflict with, and in violation of, the provisions of the Fourteenth Amendment thereof and the Tenth Section of Article One thereof, and in holding that pursuant to said Statute, the Provident Savings Life Assurance Society, after withdrawing from the State of Kentucky and ceasing to do business therein, continued liable to pay to the State of Kentucky, taxes upon premiums paid to it outside of the State of *the* Kentucky, for, as the result of so holding, the State of Kentucky seeks to deprive the plaintiff in error of its property without due process of law, and to deny to it the equal protection of the laws and to impair the obligation of a contract entered into between the plaintiff in error and the State of Kentucky prior to the passage of said Act.

2. The court erred in holding that said Section 4230A Kentucky Statutes did not deprive the plaintiff in error, which had withdrawn from the State of Kentucky and ceased to do business therein, of its property without due process of law, and did not deny to it the equal protection of the laws, and did not impair the obligation of the contract entered into between the plaintiff in error and the

50 State of Kentucky prior to the passage of said Act.

3. The court erred in holding that the receipt, by the plaintiff in error, of premiums in the State of New York upon policies written in Kentucky prior to its withdrawal from the State of Kentucky and the cessation of further writing of business therein, constituted "doing business" in the State of Kentucky so as to bring it within the provisions and operations of Section 4226 Kentucky Statutes, and in holding that such construction of the action of the action of the plaintiff in error in so receiving the premiums in the State of New York and outside of the State of Kentucky upon policies written in the State of Kentucky prior to the withdrawal there-

from, did not violate the provisions of the Constitution of the United States, and particularly the Fourteenth Amendment thereof and the Tenth Section of Article One thereof, and did not deprive the plaintiff in error of its property without due process of law, and did not deny to it the equal protection of the laws, and did not impair the obligation of the contract entered into between the State of Kentucky and the plaintiff in error at the time the plaintiff in error commenced to do business in the State of Kentucky.

4. The court erred in holding that the plaintiff in error was liable to the State of Kentucky for taxes upon premiums collected during the year 1911 outside of the State of Kentucky by the Postal Life Insurance Company, and no part of which was received by the Provident Savings Life Assurance Society, and in holding that the collection by the State of Kentucky of taxes from the plaintiff in error, on account of premiums collected outside of the State of Kentucky by the Postal Life Insurance Company, who reinsured the business of the plaintiff in error, is not in violation of the Constitu-
51 tion of the United States, and especially the Fourteenth Amendment thereof and the Tenth Section of Article One thereof, and does not deprive the plaintiff in error of its property without due process of law, and does not impair the obligation of the contract made between it and the State of Kentucky at the time that it entered the State of Kentucky and was granted a license to do business, and does not deprive the plaintiff in error of the equal protection of the laws.

5. The court erred in holding that Section 4226 Kentucky Statutes, as construed to be applicable to the plaintiff in error during the year 1911 as to premium collected by the Postal Life Insurance Company, who reinsured the plaintiff in error, and no part of which premiums were received by the plaintiff in error, is valid and not repugnant to the Constitution and laws of the United States, and especially the Fourteenth Amendment thereof and the Tenth Section of Article One thereof, and in holding that such statute, as so construed, does not deprive the plaintiff in error of its property without due process of law, and does not impair the obligation of the contract made between it and the State of Kentucky at the time that it entered the State of Kentucky and was granted a license to do business therein, and does not deny to plaintiff in error the equal protection of the laws.

Wherefore plaintiff in error prays that said decree be reversed.

KEITH L. BULLITT,
Counsel for Plaintiff in Error.

Filed Dec. 22, 1914.

J. P. HOBSON,
Chief Justice.

Filed Dec. 22, 1914. Robt. L. Green, C. C. A.

52 And on said December 22, 1914, the Plaintiff in Error filed in said Clerk's office a Citation with service accepted, as follows:

53 UNITED STATES OF AMERICA *ss:*

To Commonwealth of Kentucky, by H. M. Bosworth, Auditor, and to H. M. Bosworth, Auditor of the State of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Kentucky, wherein the Provident Savings Life Assurance Society is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error, mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court, this 22nd day of December 1914 in the year of our Lord One Thousand Nine Hundred and Fourteen.

J. P. HOBSON,
Chief Justice of the Court of Appeals of the State of Kentucky.

Service of the within citation is hereby acknowledged this 22d day of December, 1914.

CHARLES H. MORRIS,
Assistant Attorney General,
Attorney for Commonwealth of Kentucky,
By H. M. BOSWORTH, *Auditor.*

Filed Dec. 22, 1914. Robt. L. Greene, C. C. A.

54 And on January 2, 1915, the said Plaintiff in Error filed in said Clerk's office, the Præcipe in words and figures following, to-wit:

In the Court of Appeals of Kentucky.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, by H. M. BOSWORTH, Auditor, Appellee.

To the Clerk of the Court of Appeals of the State of Kentucky, sitting at Frankfort, Kentucky.

SIR: The appellant and plaintiff in error, Provident Savings Life Assurance Society, having filed its petition herein and been awarded a Writ of Error by the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, desires the following portions of the record herein to be incorporated into the transcript for use in the Supreme Court of the United States upon said Writ of Error, towit:

(Appearing in the Transcript on the First Appeal.)

1. Petition.
2. Answer filed May 1st 1913.
3. Demurrer filed May 1st, 1913.
4. Order or judgment entered May 1st 1913 overruling the demurrer and dismissing the petition.
5. Opinion of the Court of Appeals of Kentucky reversing the order or judgment of May 1st 1913 and remanding the case for further proceedings (Reported in 155 Ky. 197).
55 6. Opinion of the Court modifying its previous opinion (Reported in 155 Ky. 771).

(Appearing in the Transcript on the Second Appeal.)

7. Mandate of the Court of Appeals issued December 19th 1913 reversing the judgment of the Franklin Circuit Court.
8. Amended answer filed January 31st 1914.
9. Demurrer filed January 31st 1914 to second paragraph of the amended answer.
10. Judgment entered January 31st 1914.
11. Opinion of the Court of Appeals affirming the judgment entered January 31st 1914. (Reported in 160 Ky. 16.)
12. Mandate of the Court of Appeals directing the affirmance of the Judgment entered January 31st 1914.
13. Petition for Writ of Error including prayer for reversal.
14. Bond.
15. Assignment of Errors.
16. Order granting Writ of Error and approving bond.
17. Writ of Error.
18. Citation.
19. This Præcipe.

KEITH L. BULLITT,
Counsel for Plaintiff in Error, Provident Savings Life Assurance Society.

The time fixed for the return of the Citation and the Writ of Error and the notice herein given is agreed as sufficient and Service of a copy of the foregoing Præcipe is hereby accepted and it is agreed that the above constitutes the Transcript of Record upon the Writ of Error herein, and that the same is sufficient.

CHAS. H. MORRIS,
Attorney for Commonwealth of Kentucky,
By H. M. BOSWORTH.

Filed Jan. 2, 1915. Robt. L. Greene, C. C. A.

56 COMMONWEALTH OF KENTUCKY,
Court of Appeals, sct:

In obedience to the command of the attached Writ of Error from the Supreme Court of the United States, I herewith transmit to said Court a complete transcript of so much of the record and proceedings in the case of Provident Savings Life Assurance Society, Appellant and Plaintiff in Error against The Commonwealth of Kentucky, by &c., Appellee and Defendant in Error, as is directed by the Præcipe of the plaintiff in Error, filed herein and returned herewith, as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal. Done at the Capitol at Frankfort on this the 9th day of January, A. D. 1915.

[Seal Kentucky Court if Appeals.]

ROBT. L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript $17.50.

Endorsed on cover: File No. 24,521. Kentucky Court of Appeals. Term No. 777. Provident Savings Life Assurance Society, plaintiff in error, vs. The Commonwealth of Kentucky, by H. M. Bosworth, auditor. Filed January 18th, 1915. File No. 24,521.

Office Supreme Court, U. S.
FILED
JUN 14 1915
JAMES D. MAHER
CLERK

No. 777 328

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, - - - - - - - Plaintiff in Error,

versus

THE COMMONWEALTH OF KENTUCKY, By H. M. Bosworth, Auditor, - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

MOTION TO ADVANCE.

WM. MARSHALL BULLITT,
KEITH L. BULLITT,
Counsel for Plaintiff in Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 777.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, - - - - - - - *Plaintiff in Error,*

versus **Motion to Advance.**

THE COMMONWEALTH OF KENTUCKY, BY H. M. BOSWORTH, AUDITOR, - *Defendant in Error.*

In Error to the Court of Appeals of the State of Kentucky.

The plaintiff in error, Provident Savings Life Assurance Society, moves the court to advance this case for hearing on the docket (the record having been printed), because (*a*) of the importance of the question in its effect upon the revenue of the State of Kentucky, and (*b*) *a decision of this case will control a number of similar suits* now pending in the State courts of Kentucky and thus avoid numerous writs of error from this court in such cases and in this way will tend *to lighten the docket of this court.*

A brief statement of the question involved is as follows:

STATEMENT OF FACTS.

The defendant is a foreign life insurance company which, prior to January 1, 1907, was doing business in Kentucky under a license by the Kentucky Insurance Commissioner.

On January 1, 1907, the defendant ceased writing new business in Kentucky, withdrew all of its agents, closed all of its offices in Kentucky and attempted to sever all relations with the State of Kentucky.

Thereafter the Commonwealth of Kentucky instituted suit against the defendant to recover *taxes* upon renewal premiums received through the mails in New York by the defendant from the Kentucky policyholders, which premiums became due after January 1, 1907, upon policies previously written while the defendant was making the proper reports to the State Insurance Commissioner and was complying with all the laws of this State relative thereto.

The suit to recover the taxes upon these renewal premiums was based upon Section 4226 of the Kentucky Statutes, which provides that an insurance company doing business in Kentucky shall pay the State of Kentucky a license tax upon all renewal premiums received in cash or otherwise in this State or out of this State on business done in this State.

Similar suits were instituted against several other foreign life insurance companies which had withdrawn from the State and a large revenue to the State of Kentucky from such insurance companies is directly involved

in, and dependent upon, an early decision herein. In the meantime the revenue is being withheld from the State of Kentucky.

LEGAL QUESTION INVOLVED.

The sole question involved is the constitutionality of Section 4226 of the Kentucky Statutes above referred to in compelling a company, after it has ceased to write new business in this State and when it has no property in this State, to pay taxes upon renewal premiums collected by it upon business done in this State, while it was authorized by the Insurance Commissioner; the defendant claiming that the action of the State authorities thereunder is an effort to impose a privilege tax upon a foreign insurance company in exchange for a privilege which the defendant insists is not granted.

WHEREFORE, the plaintiff in error respectfully prays that this case be advanced upon the docket and assigned to as early a day as may be practicable.

WM. MARSHALL BULLITT,
KEITH L. BULLITT,
Counsel for Plaintiff in Error.

The defendant in error, Commonwealth of Kentucky, by H. M. Bosworth, Auditor, concurs in the motion of the plaintiff in error to advance the above-styled case.

JAMES GARNETT,
Attorney General.
JOHN A. JUDY,
Counsel for Defendant in Error.

Office Supreme Court, U. S.
FILED
OCT 18 1915
JAMES D. MAHER
CLERK

3

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915. No. 328.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR THE PLAINTIFF IN ERROR.

1. **A foreign life insurance company that withdrew absolutely from Kentucky and thereafter merely received renewal premiums in New York on outstanding Kentucky policies, exercised no privilege from Kentucky and is not subject to a Kentucky license tax on account of the monies so received in New York.**
2. **Ky. Stat., § 4226, is unconstitutional because it imposes a license tax upon renewal premiums collected in New York after the Provident Savings had absolutely withdrawn from Kentucky. The act of receiving premiums in New York cannot be prohibited or taxed in Kentucky.**
3. *Equitable Life* **v.** *Pennsylvania*, **238 U. S. 143, distinguished and relied on.**

WM. MARSHALL BULLITT,
Counsel for the Plaintiff in Error.

CHARLES C. LOCKWOOD,
KEITH L. BULLITT,
CLARENCE C. SMITH,
Of Counsel.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

INDEX.

PAGE

STATEMENT OF THE CASE—

1. Nature of the controversy 1–2
2. License taxes imposed by Kentucky on foreign life insurance companies 3
3. The withdrawal of the Provident Savings from Kentucky 4
4. Suit to recover license taxes for period (1907–1911) after the withdrawal 6
5. The two opinions of the Court of Appeals of Kentucky 7–8
6. The assignment of errors 9
7. Summary of points discussed 9
8. The statute involved 10

ARGUMENT.

FIRST POINT: The tax levied by Ky. Stat., § 4226, is a license tax imposed on foreign insurance companies for the privilege of doing business within Kentucky 12

Northwestern Mutual Life v. *James, Auditor*, 138 Ky. 48, 52.

Southern B. & L. Assn. v. *Norman, Auditor*, 98 Ky. 294, 298, 300, 304.

Fidelity & Casualty Co. v. *Louisville*, 106 Ky. 207, 211.

Equitable Life Society v. *Pennsylvania*, 238 U. S. 143, 146.

PAGE

SECOND POINT: Ky. Stat., § 4226, as construed by the Court of Appeals, violates the "due process" clause of the Fourteenth Amendment, because: 13–33

1. The State of Kentucky cannot tax a license or privilege which it does not grant 13

Horn Silver Mining Co. v. *New York*, 143 U. S. 305.

New York v. *Roberts*, 171 U. S. 658, 664.

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 164–167.

Louisville, etc., Ferry Co. v. *Kentucky*, 188 U. S. 385, 396, 398.

Delaware, &c., R. R. Co. v. *Pennsylvania*, 198 U. S. 341, 358, 360.

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194, 204, 209–211.

Buck v. *Beach*, 206 U. S. 392, 400.

2. The Provident Savings has done nothing, since its withdrawal, which can be construed as "doing business" in Kentucky so as to justify the exaction by that State of a privilege or license tax 14–16

Hunter v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573.

State v. *Connecticut Mutual*, 106 Tenn. 258.

PAGE

8. The receipt by the Provident Savings of premiums in New York, after its withdrawal from Kentucky, was not by virtue of any privilege or license of Kentucky; and hence neither the premiums so received nor the privilege of receiving them are taxable by Kentucky 16–29

1. The company cannot be taxed for the act of the policy holders.. 17

Almy v. *California*, 24 How. 169.

Fairbank v. *U. S.* 118 U. S. 283, 292, 293.

Allgeyer v. *Louisiana*, 165 U. S. 578, 591–593.

2. The Company's Act was in New York, not Kentucky 18–21

Prewitt v. *Security Mutual*, 119 Ky. 321.

Bedford v. *Eastern Building & Loan Assn.*, 181 U. S. 227.

People v. *Miller*, 179 N. Y. 227.

State v. *Conn. Mut. Life*, 106 Tenn. 258.

3. The bare legal liability to Kentucky policyholders is not taxable by that State..... 21–30

New York Life v. *Deer Lodge County*, 231 U. S. 495, 508.

Allgeyer v. *Louisiana*, 165 U. S. 578, 588, 591, 592.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 161.

4. *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, distinguished and relied on..... 30–34

LIST OF AUTHORITIES.

	PAGES
Allgeyer v. *Louisiana*, 165 U. S. 578	17, 23, 24, 27
Almy v. *California*, 24 How. 169	17
Anderson v. *Santa Anna*, 116 U. S. 356	30
Bedford v. *Eastern Bldg. & Loan Assn.*, 181 U. S. 227	20
Bosworth v. *Metropolitan Life Ins. Co.*, 162 Ky. 344	4, 6, 11
Buck v. *Beach*, 206 U. S. 392	14
Burgess v. *Seligman*, 107 U. S. 20	30
C., B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226.	16
Commonwealth v. *Equitable Life*, 239 Pa. St. 288.	8, 21
Commonwealth v. *Provident Savings*, 155 Ky. 197	1, 8
Commonwealth v. *Washington Life*, 159 Ky. 581.	5
Conn. Mutual Life v. *Spratley*, 172 U. S. 602	33
Covenant Mutual Life v. *Kentner*, 188 Ill. 431	22
Delameter v. *South Dakota*, 205 U. S. 93	24
Delaware, &c., R. R. Co. v. *Pennsylvania*, 198 U. S. 341	14
Equitable Life Society v. *Pennsylvania*, 238 U. S. 143	2, 12, 13, 29, 30, 32
Fairbank v. *United States*, 181 U. S. 283	17
Fidelity & Casualty Co. v. *Louisville*, 106 Ky. 207	12
Flint v. *Stone Tracy Co.*, 220 U. S. 107	13
Great Southern Hotel Co. v. *Jones*, 193 U. S. 532.	30
Harrison v. *St. Louis & S. F. R. Co.*, 232 U. S. 318	29
Herndon v. *C., R. I. & P. R. Co.*, 218 U. S. 135.	29
Holden v. *Hardy*, 169 U. S., at p. 391	24

PAGES

Horn Silver Mining Co. v. *New York*, 143 U. S. 305 13
Hunter v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573 ..... 14, 34

Lehman v. *Clark*, 174 Ill. 279 22
Louisville, &c., Ferry Co. v. *Kentucky*, 188 U. S. 385 ..... 2, 14, 30
Ludwig v. *Western Union Tel. Co.*, 216 U. S. 146 29

Mutual Benefit v. *Com.*, 128 Ky. 174 5
Mutual Reserve v. *Phelps*, 190 U. S. 47 33

New York Life Ins. Co. v. *Deer Lodge County*, 231 U. S. 495 22
New York Life Ins. Co. v. *Head*, 234 U. S. 149 ..... 24, 26, 29
New York v. *Roberts*, 171 U. S. 658 13
Northwestern Mutual Life v. *James*, 138 Ky. 48 ..... 3, 6, 11, 12
Nutting v. *Massachusetts*, 183 U. S. 557 24

People v. *O'Brien*, 111 N. Y. 1 20
People v. *Miller*, 179 N. Y. 227 20
Prewitt v. *Security Mutual Life Ins. Co.*, 119 Ky. 321 19
Provident Savings v. *Commonwealth*, 160 Ky. 16 1, 8
Pullman Co. v. *Kansas*, 216 U. S. 56 29

Southern B. & L. Assn. v. *Norman*, 98 Ky. 294 12
State v. *Columbian Nat. Life*, 141 Wis. 557 3
State v. *Conn. Mutual Life Ins. Co.*, 106 Tenn. 258 ..... 3, 15, 17, 18
Stone v. *Penn., &c.. Ry.*, 197 N. Y. 279 24

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194 ..... 2, 14, 16, 30
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1 29

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1915. No. 328.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

The State of Kentucky recovered a judgment for $9,788.22 against the Provident Savings Life Assurance Society of New York (hereafter called the Provident Savings), a foreign life insurance company, for license taxes for the years 1907–1911, being 2 per cent. of the renewal premiums for those years which pre-existing Kentucky policyholders had remitted by mail to the company at its New York office, *after the company had, on December 31st, 1906, entirely withdrawn from the State* (R., 19).*

---

* *Com.* v. *Provident Savings*, 155 Ky. 197; *Provident Savings* v. *Com.*, 160 Ky. 16.

This recovery was had under a license tax law of Kentucky which imposed on all foreign life insurance companies "*doing business* therein" a tax of two per cent. on all premiums received "on *business done* in this State" during the preceding year.

The facts are undisputed; and the only controversy is whether, upon such conceded facts, the Provident Savings was in 1907–1911 "doing business" in Kentucky so as to authorize the State to impose a license tax.

This case involves nothing except the constitutionality of a Kentucky taxing statute (Ky. Stat., Sec. 4226) under the "due process" clause of the Fourteenth Amendment; and it presents for decision the single clear cut legal question which was expressly left open in *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143, 146, to wit: "whether the *residence* of a *policyholder* would of itself give jurisdiction [for purposes of taxation] over the Company."

The plaintiff in error contends that having no property in the State, having withdrawn therefrom, doing no business therein and no longer exercising any right or privilege whatever thereunder, the tax is void under the rule of *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, and *Louisville, &c., Ferry Co.* v. *Kentucky*, 188 U. S. 385, because a State (*a*) cannot tax property beyond its jurisdiction, and (*b*) cannot impose a privilege tax upon a foreign corporation which is not doing business in, nor otherwise exercising any privilege from the State.

In the only other instance in this country where such

tax has been imposed the decision was against the validity of the tax (*State* v. *Conn. Mutual Life Ins. Co.*, 106 Tenn. 258). To the same effect see *State* v. *Columbian Nat. Life*, 141 Wis. 557.

STATEMENT OF THE CASE.

For nearly fifty years Kentucky has imposed on foreign life insurance companies "doing business therein" an annual "*license tax*" of 2 per cent. of the premiums collected "on business done in this State" (see Act March 12, 1870, § 41; Acts 1869–70, p. 75; Act Nov. 11, 1892, Acts 1891-92-93, p. 348; Act March 29, 1902, Acts 1902, p. 368; Act March 15, 1906, Acts 1906, p. 209; Ky. Stats. (Ed. 1894, 1899), § 4227; (Ed. 1903, 1909, 1915), § 4226; *Northwestern Mutual Life* v. *James, Auditor*, 138 Ky. 48, 49, 52).

Many years prior to 1906 the Provident Savings was admitted to do business in Kentucky and was engaged in the business of life insurance in Kentucky and in other States. All applications for insurance were transmitted to the Home Office in New York where it accepted or rejected them; and, if accepted, the policy was mailed to the company's agents in Kentucky who delivered the policy to the insured, and collected the initial premium. All policies provided that the premiums were payable at the Home Office in *New York*, and that the face of the policies, when due, and all other obligations or benefits were payable and to be performed in *New York* (R., 14).

The Provident Savings paid to the State of Kentucky all taxes under such laws upon premiums col-

lected up to January 1, 1907, when it withdrew from the State (R., 3).*

It was an absolute and unconditional withdrawal for every purpose. On January 1, 1907, the company (R., 15, 16)

> "*closed* all of its offices in the State";
>
> "*withdrew* all of its agents therefrom";
>
> "*ceased to solicit* or write further insurance in the State";
>
> "*ceased to do business* therein";
>
> "*did not* thereafter *maintain* any offices or agents in the State * * * or *solicit or write* any insurance in Kentucky or *collect* any premiums therein";
>
> "it did everything possible to *completely sever* all relations with and *terminate all connections* with the State of Kentucky and the transaction of any business therein"; and
>
> "*at no time* after January 1, 1907, did the Provident Savings *receive any money* in the State of Kentucky or *do any act whatever* therein".

---

*The cause of the withdrawal was the passage of an Act which became a law June 11, 1906 (Acts 1906, p. 211, § 2; Ky. Stat (Ed. 1909), § 4230-A, but which did not become operative on the companies until January 1, 1907, *Bosworth* v. *Metropolitan Life*, 162 Ky. 344, 346, 347, 349), providing that a foreign life insurance company should continue to pay the 2 per cent. tax on all premiums collected "*even after it has voluntarily ceased to write* insurance in the State or has *withdrawn* therefrom." Rather than subject itself to such a continuing tax the company withdrew from the State.

The present suit to recover taxes, after such withdrawal, was originally based on that statute, but when its invalidity, as applied to a foreign company which had not assented thereto as a condition of admission, was pointed out, the State shifted its position and now relies exclusively upon Ky. Stat. (Ed. 1903), § 4226.

There were many policyholders residing in Kentucky who held policies *previously* issued, which they desired to keep in force. All such premiums (R., 16)

> "were paid to the Provident Savings at its Home Office in New York City by such persons mailing through the United States mail to such Home Office of the Provident Savings in New York the amount due for such premiums;" and "at no time after January 1, 1907, did the Provident Savings receive any money in the State of Kentucky or do any act whatever therein".

It is with respect to a tax against the company of 2 per cent. upon the renewal premiums so remitted by the policyholders *after the company's withdrawal from the State* that the present controversy arises.

Owing to the fact that the same section number of the Kentucky Statutes (§ 4226) has been used to designate different statutes at different dates, resulting in some confusion and even the inadvertent quotation of the wrong statute, a brief review of the legislation on the 2 per cent. tax on insurance premiums will be excerpted in the margin (*Com.* v. *Washington Life*, 159 Ky. 581, 583).*

---

* 1. By the revenue Act of Nov. 11, 1892, one section known as Ky. Stat. § 4227 (Ed. 1894, 1899) imposed a 2 per cent. tax on the actual amount of initial and renewal premiums received by the company "on business done in this State" during the preceding year ending June 30th; and it was held that the companies only paid upon the actual premiums received, after deducting commissions, dividends, etc. (*Mutual Benefit* v. *Com.*, 128 Ky. 174, 178).

2. By the new revenue Act of March 29, 1902, that section became known as Ky. Stat. § 4226 (Ed. 1903), and imposed a 2 per cent. tax on the full initial premium (without deduction for commissions) and upon the renewal premiums (less dividends) (*Mutual Benefit* v. *Com.*, 128 Ky. 174).

3. By the next revision of our revenue laws (Act of

The State sued to recover a 2 per cent. license tax on all renewal premiums upon Kentucky policies during the years 1907–1911 (R., 1, 2).

March 15, 1906, that section, while still known as Ky. stat. § 4226 (Ed. 1909, 1915), was revised so as to impose the tax on the full initial and renewal premiums (without any deduction for dividends); and also a new section was added known as Ky. Stat. 4230-A (Ed. 1909, 1915), requiring the company to continue to pay the 2 per cent. tax on renewal premiums "*even after it has voluntarily ceased to write insurance* in the State, or has *withdrawn* therefrom, or its license *suspended* or *revoked* by the insurance commissioner" (Acts 1906, pp. 209, 211) (*Northwestern Mut. Life* v. *James*, 138 Ky. 48, 50, 51).

It was on account of the passage of this new Revenue and Taxation Act, which contained the objectionable section (Ky. Stat. § 4230-A), that the Provident Savings withdrew from the State rather than, by remaining, perhaps impliedly subject itself to that continuing tax, should it in the future desire to withdraw.

Although the Act of March 15, 1906, containing Ky. Stat. §§ 4226, 4230-A (Ed. 1909, 1915) became a law June 11, 1915, those particular sections did not become operative on the companies until January 1, 1907, the companies during the latter part of 1906 remaining liable under the existing law, *i. e.*, Ky. Stat. § 4226 (Ed. 1903). (*Bosworth* v. *Metropolitan Life*, 162 Ky. 344, 346, 349.)

4. The Court of Appeals in its opinion in the case at bar (which was not rendered until 1913) inadvertently used the then current 1909 edition of the Ky. Statutes, and quoted (R. 7) Ky. Stat. § 4226 as adopted in 1906, and then a little further on fell into an error in saying (R. 9):

> "Section 4226 of the Kentucky Statutes was a part of the law of this Commonwealth *when the appellee entered the State* * * * and this section became a part of the contract between the insurance company and the State," etc.

thus implying that the Section 4226 previously quoted in the opinion was the one referred to.

The Section 4226 quoted in the opinion was only adopted in 1906; whereas it was § 4227 (Ed. 1894, 1899) or the slightly differing § 4226 (Ed. 1903), which was in force when the Provident Savings entered the State and impliedly acceded to by operating under.

The error is not important, but it is adverted to here in order to prevent confusion in our subsequent discussion.

The Provident Savings pleaded in defense that on January 1, 1907, it had withdrawn from Kentucky and had not collected any premiums or done any business in the State thereafter; and that Ky. Stat. § 4230 A (upon which it assumed the suit was based) providing that a company should continue to pay the tax upon renewal premiums "even after it has voluntarily ceased to write insurance in the State or has withdrawn therefrom" was not binding upon the defendant because (1) it was enacted *after* the defendant was admitted to the State, and it was not a condition which it accepted as a condition of doing business in Kentucky, and that it *withdrew* from the State upon the passage of such act, and (2) the act was in violation of the Fourteenth Amendment (R., 4–5).

The lower Court upheld that defense and dismissed the petition (R., 6).

FIRST OPINION OF THE KENTUCKY COURT OF APPEALS (R., 7-11, 155 Ky. 197).

The Court of Appeals *reversed* the lower court and sustained the validity of the tax upon the ground that it was not necessary to rely upon the new Statute Section 4230–A which attempted to continue the tax even after withdrawal from the State, but that as Section 4226 was in force when the company entered the State (inadvertently quoting the 1906 Act instead of the 1892 or 1902 Act as explained in the foot note, page 5, *supra*), the company was liable for the tax on all renewal premiums "*on business done* in this State during the year ending the 30th day of June last

preceding," for the years 1907–1911; and that, notwithstanding its withdrawal, the Provident Savings was "doing business" in Kentucky within the meaning of Section 4226 so long as any pre-existing policies on Kentucky policyholders remained in force; the theory of the Court of Appeals being that the mere legal obligation of the company to a policyholder residing in Kentucky constituted a "doing of business" in Kentucky, citing *Com.* v. *Equitable Life*, 239 Pa. St. 288 (*Com.* v. *Provident Savings*, 155 Ky. 197; R., 7–11).

On the remanding of the case to the lower court, the Provident Savings filed an Amended Answer pleading that Section 4226, as so construed, was in violation of the "due process" clause of the Fourteenth Amendment (R., 14–18). The lower court sustained a demurrer thereto, and rendered judgment for the taxes sued for (R., 19, 20).

SECOND OPINION OF THE KENTUCKY COURT OF APPEALS (R., 20, 21.)

The Court of Appeals affirmed the judgment upon the strength of its former opinion, and summarily disposed of the Federal question as follows (R., 21);

> "Being further of the opinion that the sections of the statute referred to [§§ 4226, 4230–A] do not violate the 14th Amendment to the Constitution of the United States, the judgment appealed from is affirmed" (*Provident Savings* v. *Com.*, 160 Ky. 16, 18; R., 20, 21).

To review that judgment this writ of error was taken (R., 21, 22).

ASSIGNMENT OF ERRORS.

The Court of Appeals erred in holding (1) that Ky. Stat., Section 4226, as construed by it, was not in violation of the "due process" clause of the Fourteenth Amendment; and (2) that under such statute the State could lawfully impose a tax upon a foreign insurance company which had entirely withdrawn from the State (Assignment of Errors No. 3; R., 26).

SUMMARY OF POINTS DISCUSSED.

1. The tax levied by Ky. Stat. § 4226 is a license tax imposed on foreign insurance companies for the privilege of doing business within Kentucky (p. 12, infra).

2. Ky. Stat. § 4226, as construed by the Court of Appeals, violates the "due process" clause of the Fourteenth Amendment, because

1. **The State of Kentucky cannot tax a license or privilege which it does not grant (p. 13).**
2. **The Provident Savings has done nothing, since its withdrawal, which can be construed as "doing business" in Kentucky so as to justify the exaction by that State of a privilege or license tax (pp. 14-16).**
3. **The receipt by the Provident Savings of premiums in New York, after its withdrawal from Kentucky, was not by virtue of any privilege or license of Kentucky; and hence the premiums so received are not taxable by Kentucky (pp. 16-30).**
4. ***Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, distinguished and relied on (pp. 30-34).**

ARGUMENT.

The decision of the State Court is final on the point that Ky. Stat., Section 4226, covers the transactions in question; and that the receipt by the Provident Savings in New York, after it had withdrawn from the State, of money sent to it through the mails by Kentucky policyholders in payment of premiums on policies written before such withdrawal, constitutes "business done in this State" within the meaning of Section 4226.

The sole question open to review here is whether the statute, so construed, deprives the company of its property without "due process of law" contrary to the Fourteenth Amendment; that is to say, is a foreign corporation, which has *withdrawn* from Kentucky and has neither property, offices, nor agents therein nor does any act therein, subject to a continuing tax upon remittances voluntarily mailed by Kentucky policyholders to the company in New York in payment of premiums on policies written prior to such withdrawal?

We submit that the tax is illegal because a State cannot impose a privilege or license tax upon a foreign corporation which is not, during the period covered by the tax, exercising a privilege or authority under such State.

§ 4226 of the Ky. Statutes (Ed. 1903) (Acts March 29, 1902; Acts 1902, p. 368), reads as follows:

> "Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this State, but *doing business* therein, shall on the first day of July in each year, or within thirty days there-

after, return to the Auditor of Public Accounts for deposit in the Insurance Department a statement under oath of *all premiums* receipted for on the face of the policy for original insurance and all renewal premiums *received* in cash or otherwise in this State, or out of this State, *on business done in this State* during the year ending the thirtieth day of June last preceding, or since the last returns were made and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained."

This is the Statute, the constitutionality of which is here involved, and under which the Provident Savings continued in business until 1907. It was amended by the Act of March 15, 1906, Ky. Stat. (Ed. 1909), § 4226, so as to require the tax to be paid upon the full premiums without deduction for dividends (see foot note, p. 6, *supra*, *Northwestern Mutual Life* v. *James*, 138 Ky. 48, 50), but as that Act did not become operative until January 1, 1907 (*Bosworth* v. *Metropolitan Life*, 162 Ky. 344, 346, 349; p. 6, note, *supra*), and as the Provident Savings had (on account of the objectionable features of another section of the same Act), "immediately" after its passage, withdrawn from the State (foot note, pp. 4, 6, *supra;* R., p. 15), it is the Act of 1902, Ky. Stat. (Ed. 1903), § 4226, whose constitutionality is now contested.*

* This explanation is made on account of the quotation by the Court of Appeals in its first opinion (R., 7) of the 1906 Act, coupled with the erroneous statement (R., 9) that it "was a part of the law of this Commonwealth when the appellee entered the State".

The error was due to the Court's inadvertent use of a subsequent and then (1913) current edition of the Ky. Statutes without observing the change in the language that had been made in 1906 The constitutional objections apply equally to either the original or amended Act. This explanation is merely made in the interest of accuracy.

FIRST POINT.

The tax levied by Ky. Stat., § 4226, is a license tax imposed on foreign insurance companies for the privilege of doing business within Kentucky.

In *Northwestern Mutual Life* v. *James, Auditor*, 138 Ky. 48, 52, the Court of Appeals construed Ky. Stat. 4226 saying

> "The tax of $2 upon each $100 of premiums is *not* a property tax. It is simply a *license tax*. and being a *license tax*, the Legislature has a broad discretion * * * we cannot say that the Legislature exceeded its power in fixing the amount of this *license tax* * * *".

This was in accord with the title "*License tax* of foreign corporations" used in the subheading of the original Act and in the various statutory compilations (see Art. XI, Ky. Stat., Ed. 1894, 1899, 1903, 1909, 1915; Acts 1891, 2, 3, p. 348); and with the uniform decision on statutes of that character (*Southern B. & L. Assn.* v. *Norman, Auditor*, 98 Ky. 294, 298, 300, 304; *Fidelity & Casualty Co.* v. *Louisville*, 106 Ky. 207, 211).

In *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, 146, it was held under a substantially identical statute that a 2 per cent. tax upon the premiums received from business done in the State was *not* a property tax, but was "a tax for the privilege of doing business within the Commonwealth".

The only thing involved on this writ of error is whether a State may impose a *license tax* on a foreign corporation, under the circumstances disclosed by this record.

SECOND POINT.

Ky. Stat. § 4226, as construed by the Court of Appeals, violates the "due process" clause of the Fourteenth Amendment, because

1. **The State of Kentucky cannot tax a license or privilege which it does not grant.**

2. **The Provident Savings has done nothing, since its withdrawal, which can be construed as "doing business" in Kentucky so as to justify the exaction by that State of a privilege or license tax.**

3. **The receipt by the Provident Savings of Premiums in New York, after its withdrawal from Kentucky, was not by virtue of any privilege or license of Kentucky; and hence the premium so received are not taxable by Kentucky.**

4. ***Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, distinguished and relied on.**

1. *The State of Kentucky cannot tax a license or privilege it does not grant.*

A State can impose a license tax upon a foreign corporation for the privilege of permitting it to do business in the State, and is allowed wide latitude in fixing the measure of such tax (*Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *New York* v. *Roberts*, 171 U. S. 658, 664; cases cited in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 164–167; *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, 147); but just as a State

cannot tax property, tangible or intangible, beyond its territorial jurisdiction (*Louisville, &c., Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396, 398; *Delaware, &c., R. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 358, 360; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 204, 209–211; *Buck* v. *Beach*, 206 U. S. 392, 400), so it necessarily follows that a State cannot tax a foreign corporation for a privilege or license which the State does not grant it.

For a State to exact a privilege or license tax from a foreign corporation, when the State does not grant that corporation any privilege or license, is depriving that corporation of its property without due process of law. The simple assertion of such a proposition is a complete argument in itself. No further argument or authority is necessary to demonstrate that axiomatic proposition.

II. *The Provident Savings has done nothing since its withdrawal, which can be construed as "doing business" in Kentucky so as to justify the exaction by that State of a privilege or license tax.*

During the years (1907–1911) for which the license taxes were imposed, the Provident Savings had no offices, no agents, no employes, and no property in the State; it neither solicited nor wrote any policies in the State; it did not collect or pay out a dollar in the State; it did no act whatsoever in the State (R. 4, 14–16). It did not even carry on those few separate and disconnected transactions in closing up old business, which in *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573,

were held permissible without subjecting the company to the charge of "doing business".

When the Provident Savings withdrew from Kentucky on January 1, 1907, it did so, absolutely and unreservedly, in order "to completely sever all relations with and terminate all connections with the State of Kentucky, and the transaction of any business therein" (R., 16). If it be legally possible for a corporation which has once been admitted to a State, to withdraw therefrom and to cease to exercise the privilege of doing business in the State, certainly the Provident Savings accomplished that result.

Therefore, the State of Kentucky had no power to tax the company for the exercise of a privilege which the company had surrendered and no longer used.

While the decision of the State court is final that the statute (§ 4226) embraces the act of the Provident Savings in receiving premiums in *New York*, the question is still open for this Court to say whether that act in *New York* constitutes such an entry into *Kentucky* as authorizes it to exact a license tax therefor.

In *State* vs. *Connecticut Mutual Life*, 106 Tenn. 258, a statute exacted of foreign insurance companies an annual privilege tax of 2–1/2 per cent. of the gross premium receipts. The Connecticut Mutual withdrew from the State, leaving some of its policies in force. It, thereafter, received in another State, through the mail and express, the accruing premiums on such policies.

The Court held that the Company was not "doing business" in Tennessee so as to subject it to the tax.

Although the exact point decided was that the

receipt of premiums in a foreign State was not "doing business" in Tennessee (the exact opposite of what the Kentucky Court decided), yet the reasoning of the Tennessee Court is valuable with respect to the Federal question, because it points out very clearly that while it was optional with the insured to pay the premiums, it was obligatory upon the company to receive it; and that the receipt of premiums in a foreign State was doing business in the foreign State and not in Tennessee.

We submit that for the State of Kentucky to take the $9,788.22 recovered in this case, as a license tax for alleged privileges granted a foreign corporation in 1907–1911, when in fact no privileges were granted or used, is to take the company's property without compensation, and is hence protected by the 14th Amendment (*Chicago, &c., R. R. Co.* v. *Chicago*, 166 U. S. 226; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 202).

III. *The receipt by the Provident Savings of premiums in New York, after its withdrawal from Kentucky, was not by virtue of any privilege or license of Kentucky; and hence neither the premiums so received nor the privilege of receiving them are taxable by Kentucky.*

The whole theory upon which a State has the right to impose a so-called privilege, license or franchise tax on a foreign corporation is that the State is *extending* a privilege; but if the privilege sought to be taxed is something which the company has an absolute legal

right to do without the consent of the State, then the State cannot say that it is granting that privilege.

The State contends that although the Provident Savings had withdrawn from the State, nevertheless the mere receipt of premiums on old policies at its Home office in *New York* is "doing business" in *Kentucky*, because such payment continues in force the legal liability of the company to a person residing in Kentucky.

Such a contention is wholly untenable because, if it be sound, it must follow that the Provident Savings, a New York corporation, in receiving the money in *New York*, was exercising some privilege that Kentucky granted; and yet obviously that is not so, for many independent reasons, as a little analysis will demonstrate.

FIRST: The action of the policyholders in *sending* checks or money to New York to pay the premiums, was certainly not the act of the *company*. It was not thereby exercising any privilege in or from Kentucky. The act in Kentucky was solely that of a resident of Kentucky sending money from one State to another; an act which the State could neither tax nor prohibit (*Almy* v. *California*, 24 How. 169; 6 Rose's Notes, 24; *Fairbank* v. *U. S.*, 181 U. S. 283, 292, 293; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 591–593; *State* v. *Conn. Mut. Life*, 106 Tenn. 258).

Certainly Kentucky cannot tax a foreign corporation with respect to an act done by a citizen of Kentucky, which that State is powerless to tax or prevent.

SECOND: The act of the Provident Savings in *receiving* premiums in New York, was not performed in Kentucky; and it was not done by virtue of any privilege or license from the State of Kentucky. By the terms of the policies, the premiums were payable in New York alone.

In *State* vs. *Connecticut Mutual Life*, 106 Tenn. 258, it was said:

> "* * * neither the express companies nor the postal authorities can be considered as the agents of the insurance company, but they are, when used, the agents of the insured to transmit the premiums to the company's offices beyond the state. Until the money reaches the home or foreign office of the company, and is received by it, it is not the money of the company, nor is the insured entitled to the renewal. If the money is lost *en route*, it is not the loss of the company, but of the insured. Premiums are not authorized expressly or by implication to be paid through the mail or express company, but only at the home or foreign office, and the renewal receipts are then delivered. * * * When such collection is made in a foreign state, it does not amount to doing business in Tennessee, but in such foreign state. When the premium is paid and the renewal made and completed in a foreign state, we are unable to see how any business is done in Tennessee. Neither the policy is renewed or continued, nor is the money paid in Tennessee, but both are in the foreign state. There is nothing done in Tennessee, no new business done or solicited; no agent there and no agency, no contract made,

> no money paid, no receipt for renewal given, and no business done of any character. The postal and express authorities are not the agents of the company, but of the insured, as the company's policies stipulate that the premiums shall be paid at the home or foreign office."

Any citizen of the United States has a right in the State of New York to receive money from a citizen of Kentucky without hindrance or interference by the latter State.

Kentucky had neither the power nor right to prevent the Provident Savings from so doing. It did what it had a legal right to do, and what it could have legally done if it had never come into Kentucky. Its actions in New York received no protection from the laws of Kentucky and are in no wise dependent upon the sanction of those laws. It did nothing for the doing of which it was under any obligation to procure a license from the State of Kentucky.

In *Prewitt, Com'r.* v. *Security Mutual Life Insurance Co.*, 119 Ky. 321, it was held that the license granted to a foreign insurance company was revocable at the pleasure of the State; and in upholding the revocation of the license of the Security Mutual by the Insurance Commissioner, the nature of a "license" was thus explained:

> "The license which the State grants is purely a matter of grace, and, like any other license, may be revoked by the licensor at pleasure. The revocation of a license interferes with no legal right of the licensee, for when he takes, he takes it subject to revocation. He cannot ques-

> tion the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State with or without reason. * * *"

If the receipt of premiums in New York constitutes "doing business" in Kentucky, it follows that under the authority of the case above cited, the privilege of doing so might be revoked at the will of the Insurance Commissioner—*a reductio ad absurdum*, for it is clear that he has no power or right under the law of Kentucky either (1) to prohibit the company from receiving premiums in New York, or (2) to prohibit Kentucky policyholders from sending the premiums to New York, for such action would be extraterritorial, interfere with the freedom of contracts and impair the obligation of contracts. The contracts of insurance being valid when they were made, can not now be interfered with nor the contractual relations between the parties disturbed (*Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227; *People* v. *Miller*, 179 N. Y. 227, 71 N. E. 930).

In *People ex rel.* v. *Miller*, 179 N. Y. 227, the New York Court of Appeals expressed the above proposition in the following language:

> "Contracts of life insurance once made exist solely by virtue of the right to contract at the time they were entered into by the parties, and not by virtue of any privilege or franchise from the State (*People* v. *O'Brien*, 111 N. Y. 1). When a corporation merely does what it has the right to do without the consent of the State, it is not in any legal or proper sense exercising a franchise * * *".

It follows, therefore, that the mere receipt of premiums in New York is not by virtue of any franchise of the Commonwealth of Kentucky, but is wholly independent of it. The conclusion is irresistible, therefore, that, receiving no privilege or benefit from the State of Kentucky, the Provident Savings should not be held liable for any tax on account thereof.

THIRD: The theory of the Court of Appeals (based on a quotation from *Commonwealth* v. *Equitable Life*, 239 Pa. St. 288, but without observing that there the company was confessedly doing business in Pennsylvania) was that the Provident Savings was "doing business" in Kentucky because, even after its withdrawal, it was "furnishing indemnity," *i. e.*, remained under a legal liability to the Kentucky policyholders. In short, recognizing that the company had so completely withdrawn from the State that it could not seize upon any physical transactions in the State as a continuance of its business, the Court of Appeals was forced to rest its right to tax, upo n the mere existence of the company's legal obligation to indemnify the beneficiaries.

Such a theory must be promptly rejected for many reasons:

First: A life insurance policy is unilateral; that is, the company is bound to continue the insurance provided the premiums are paid, but the policy holder is under no obligation whatever to pay the premiums. Hence the continuance of the liability of the company depends, not on any act of its, but solely upon the

voluntary act of the policyholder (1 Cooley on Insurance, 82; *Covenant Mutual Life* v. *Kentner*, 188 Ill. 431; *Lehman* v. *Clark*, 174 Ill. 279).

Such passive acts on the part of the Provident Savings (*i. e.*, accepting money it was bound to receive), committed *outside* of the State of Kentucky, do not, either by authority or reason, constitute "doing business" *in* Kentucky. Under its policies of insurance which it issued while it was in Kentucky, and paid a license for the privilege so to do, it was *compelled* to accept the premiums when tendered to it at its office in New York, and is compelled to continue liable as long as the policies are outstanding.

It cannot relieve itself of this obligation; it is an obligation imposed upon it by law; it is a situation and not an act; and it is one which cannot be construed to be such an *act* on the part of the Provident Savings as to constitute "doing business" under a license from Kentucky.

A contract of life insurance is a purely personal contract.

As said in *N. Y. Life Insurance* v. *Deer Lodge County*, 231 U. S. 495, 508:

> "*A policy of insurance*, the cases declare, *is a personal contract*, a mere indemnity, for a consideration, against the happening of some contingent event, which may bring detriment to to life or property, and its character is the same no matter what the event insured against, whether fire or hurricane, acts of man or acts of God, storms on land or storms on sea, death or lesser accident. The same event may in-

> volve both life and property, precipitating the obligation of the policies. *Nor does the character of the contracts change by* their numbers or *the residence of the parties.* * * * That they may live in different States and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one State to another, to paraphrase *Paul* v. *Virginia.*"

The purely personal nature of a life insurance contract is the established rule of this Court because on that alone rests its doctrine that the transactions between the company and the insured are not interstate commerce.

A State cannot tax or prohibit the act of one of its citizens performed outside its limits respecting a mere personal contract even though the contract relate to property inside its limits (*Allgeyer* v. *Louisiana*, *supra.*) *A fortiori*, it cannot tax a foreign corporation for such an act outside its limits, even though the act be incidental to a contract respecting property or lives within its borders.

The mere legal liability is not taxable as a privilege granted by Kentucky.

Second: The Provident Savings had an absolute right, without the consent of the State of Kentucky, to issue a policy in New York, mail it to a resident of Kentucky, and receive the premium in New York through the mail. The State could not, in any possible

way, prevent it (*Allgeyer* v. *Louisiana*, 165 U. S. 578, 588, 591, 592; *Stone* v. *Penn., &c., Ry.*, 197 N. Y. 279: see *Delamater* v. *South Dakota*, 205 U. S. at p. 102; *Nutting* v. *Massachusetts*, 183 U. S. at p. 557; *Holden* v. *Hardy*, 169 U. S. at p. 391; *N. Y. Life Ins. Co.* v. *Head*, 234 U. S. at p. 161); and yet the company would be "furnishing protection to the beneficiaries" in Kentucky which the Court of Appeals said was the act of "doing business" in Kentucky justifying the license tax here imposed. But *Allgeyer* v. *Louisiana*, 165 U. S. 578, held otherwise.

As we have seen, the only connecting link between the company and the State of Kentucky consists of that intangible and purely contingent liability which it is under to such policyholders as (1) may continue to reside in Kentucky and (2) may elect to continue paying premiums. That liability, however, under the express terms of the policies, is one which is contingent upon obligations to be performed by the *policyholders* in *New York*. Having once issued policies in Kentucky under a license from the State of Kentucky, and while the Provident Savings was legally entitled to write insurance, the Provident Savings has no means of relieving itself from that liability. The continuation of this liability is a wholly involuntary act upon its part, and, in its nature, is passive in the extreme.

As the Provident Savings since its withdrawal has done absolutely nothing except what it could originally have done without ever having come into the State, there is no privilege granted which the State can tax.

Third: The reasoning of the Court of Appeals leads to a manifestly impossible result. If the mere passive act of being liable under a policy of insurance to a resident of Kentucky, constitutes "doing business" in that State, then it would follow that if an insurance company had never taken out a license to do business in Ohio, but had taken out a license and written policies in Indiana; and if subsequently an Indiana policyholder should move to Ohio, the Insurance Company would certainly be "furnishing protection" to a resident of Ohio; and, hence, according to the reasoning of the Court of Appeals, such company would be "doing business" in Ohio and subject to a license tax in that State. Manifestly an insurance company cannot thus be compelled against its will to do business in Ohio; and yet if the reasoning of the Court of Appeals is sound, to-wit: that the furnishing of indemnity to policyholders constitutes doing business in the State of their residence, it would necessarily follow that the furnishing of indemnity to an Indiana policyholder who had removed to Ohio, would constitute doing business in Ohio.

Fourth: It may be suggested that because the policies, or some of them, were in fact written originally in Kentucky, that alone gives to Kentucky the right to impose a tax upon the act of the company, after its withdrawal, in receiving premiums to continue the policies in force, because the receipt of the premiums is the result or outgrowth of acts done in Kentucky. The response to such an argument is found in *New York*

Life Insurance Co. v. *Head*, 234 U. S. 149, 161, in which it was said that because the contract was once made within the borders of a State, did not give to the State the power

> "to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the laws of the State where the contract was originally made."

The State of Kentucky cannot reach out beyond its borders so as to affect in any way the parties by reason of their act outside its limits in paying and receiving the premiums that would continue the policies in force.

It was also held in *New York Life Insurance Co.* v. *Head* that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, nevertheless it does not therefore have power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority; that the granting of a franchise to a foreign corporation could not be made the means of extending State power so as to cause it to embrace subjects beyond its legitimate authority; and that because a contract of insurance was made within the jurisdiction of a State, it had no power thereafter to control by its laws, subsequent agreements made in other jurisdictions

by persons not citizens of that State (234 U. S. 163–164).

The contracts of insurance, in this case, were already existing, legally made in Kentucky, but to be performed in New York; and the continuance of the contracts, from year to year, was conditioned upon the payment of premiums in New York. Therefore, as held in *Allgeyer* vs. *Louisiana*, 165 U. S. 578, 591, a State cannot deprive a citizen of his right to contract outside of the State for the continuance of that insurance.

The language in *Allgeyer* vs. *Louisiana*, 165 U. S. 578, 591, is most pertinent:

> "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its Statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; *nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification*, even though the property which is the subject of the insurance may at the time when

such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. *Milliken* v. *Pratt*, 125 Mass. 374; *Tilden* v. *Blair*, 21 Wall. 241. The contract in this case was thus made. It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State. As the contract was valid in the place were made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the State, any prohibition of the State statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State."

It follows, therefore, that the act of the Provident Savings in New York in accepting (as it was bound to do) the payment of premiums which continued its liability under the policies, was not subject to control by the State of Kentucky, nor done under any privilege granted by that State. That being true, neither such act nor the legal consequences flowing therefrom are subject to prohibition or taxation by Kentucky.

Finally, it may be argued that the State of Kentucky by Ky. Stat. (Ed. 1903) § 4226 (to which the Provident Savings may be held to have assented by transacting business after its passage in 1902), prescribed as a condition on which the company might do business in Kentucky during the years 1902–1906, that the company should even after withdrawal remain liable for the tax on renewal premiums.

To that we reply:

1. If, as we have endeavored to show, a State cannot under the 14th Amendment tax a company, which has withdrawn, upon renewal receipts collected in other States, then it is well settled that a State cannot effect that result indirectly by making the payment of or acquiescence in such illegal tax a condition of the right to do business in the State (*Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, 145; *New York Life Ins. Co.* v. *Head*, 234 U. S. 149, 164; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 47, 48; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 62; *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146, 163; *Harrison* v. *St. Louis & S. F. R. Co.*, 232 U. S. 318, 332; *Herndon* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 135, 158).

2. During the time the Provident Savings transacted business in Kentucky, the statute, Section 4226, had never been so construed by the courts nor by the administrative officials. The Legislature did not think the statute could reach a company after its withdrawal as shown by the passage in 1906 of Section 4230–A to effect that result. Therefore the construction now

given by the Court of Appeals to Section 4226 should not be accorded a retroactive effect so as, by implication, to bind a foreign corporation to have surrendered a Federal right (which it did not know it was surrendering) as a condition of doing business in Kentucky (*Burgess* v. *Seligman*, 107 U. S. 20; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, 548, and cases cited therein).

IV. *Equitable Life Society* v. *Pennsylvania, 238 U. S. 143, distinguished and relied on.*

A Pennsylvania statute imposed upon foreign insurance companies an annual tax of 2 per cent. upon the gross premiums "received upon business done within this Commonwealth" during the preceding year. The Equitable Life was doing a large business in Pennsylvania and paid about $90,000 a year as its 2 per cent. license tax upon the premiums collected in the State. It resisted, however, the payment of an additional sum levied as a 2 per cent. tax upon renewal premiums collected directly at its New York office upon policies in force in Pennsylvania. The company contended that the tax upon such of the premiums as were collected at its New York office was (1) a property tax upon property outside of the jurisdiction of Pennsylvania, and hence (2) illegal under the doctrine in *Louisville, &c., Ferry Co.* vs. *Kentucky*, and *Union Refrigerator Transit Co.* vs. *Kentucky*.

The tax was sustained by the State Court (239 Pa. 288); and on writ of error by this Court (238 U. S. 143).

This Court pointed out that the Equitable was admittedly being business generally in Pennsylvania; that the tax complained of was "a tax for the privilege of doing business within the Commonwealth"; that "in measuring the value of the privileges that it does grant" it was proper to consider "the benefit thus annually extended into Pennsylvania"; and accordingly it was held, HOLMES, *J.*, that

> "We are dealing with a corporation that has subjected itself to the jurisdiction of the State; there is no question that the State has a right to tax it * * *. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax. *Flint* vs. *Stone Tracy Co.*, 220 U. S. 107, 162, 163. As to that a certain latitude must be allowed. * * * It is not unnatural to take the policyholders residing in the State as a measure. * * *"

The Equitable was admittedly enjoying the privilege granted it by the State of transacting business within its limits; and hence it was undoubtedly liable to pay a license or privilege tax upon such terms as the State might exact, subject only to the qualification that the conditions should not violate the Constitution of the United States. The only question involved was whether, in fixing the tax, the State could take into consideration the premiums collected in New York upon policies in force in Pennsylvania, while the company was actively doing business there. This court held that the State could include such premiums in measuring the tax.

In the case at bar the very different question is presented, whether when the Provident Savings is doing no business whatever in Kentucky, the State can nevertheless tax it upon premiums collected in New York.

In the case of the Equitable, the question was not whether the Equitable was doing business in Pennsylvania, but what was the measure of the amount of the tax for the admitted privilege of doing business there. Here the question is whether the Provident Savings can be taxed at all; in other words, whether the collection of premiums in *New York* constitutes such an exercise by the company of a privilege granted by *Kentucky* that the latter State can exact a tax. We may concede that if the State of Kentucky has the right to tax the Provident Savings at all, then the amount of premiums collected in New York upon policies in force in Kentucky, would be a fair measure of the amount of the tax. But before that question arises, it must be determined whether Kentucky can tax a foreign insurance company merely because residents of Kentucky hold contracts of insurance in the company. It must be remembered that the Provident Savings was not doing business in the ordinary acceptation of the phrase as the Equitable was doing business in Pennsylvania, but that the only thing the Provident Savings did was to continue, against its will, to be liable on policies theretofore written in Kentucky.

It is thus seen that *Equitable Life Society* vs. *Pennsylvania* does not decide the question now involved. On the contrary, the decision in the *Equitable Life* case was based upon the fact that the Equitable was doing

business in Pennsylvania; and this court carefully reserved the question now presented, saying:

> "We are dealing with a corporation that has subjected itself to the jurisdiction of the State; there is no question that the State has a right to tax it * * * Obviously the limit in that regard *is a different matter* from the inquiry *whether the residence of a policyholder would of itself give jurisdiction over the Company.*"

The case at bar now presents "the inquiry whether the *residence* of a policyholder would of itself give jurisdiction over the company" so as to tax it upon acts done *outside* of Kentucky.

If the tax be sustained in this case, then would it not necessarily follow that each State might tax the premium receipts of foreign companies paid on account of insurance within its own borders, even though the company had never in any wise subjected itself to the jurisdiction of the taxing State?

When the license granted by Kentucky to the Provident Savings for a year only expired, and the company withdrew from the State, it thereby absolutely terminated all relations with Kentucky. It could no longer do business in Kentucky, nor could that State tax it further.

If it be argued on behalf of the Commonwealth of Kentucky that *Connecticut Mutual Life* vs. *Spratley*, 172 U. S. 602, and *Mutual Reserve Association* vs. *Phelps*, 190 U. S. 47, held that the receipt of premiums through the mail on outstanding policies previously written when the company was lawfully in the State, 22

constituted a doing of business in the State, it is sufficient to observe that those cases related to the validity of a service of process in litigation concerning policies previously written in the State, and have since been directly qualified and limited in *Hunter* vs. *Mutual Reserve*, 218 U. S. 573, to transactions with policyholders during the time the company was in the State.

CONCLUSION.

The case should be reversed with directions that the tax cannot be collected upon premiums received in New York by mail or express, etc., after the Provident Savings had on January 1, 1907, withdrawn from the State of Kentucky.

WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

CHARLES C. LOCKWOOD,
KEITH L. BULLITT,
CLARENCE C. SMITH,
Of counsel.

Oct. 16, 1915.

In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 328.

Provident Savings Life Assurance Society, of New York, ...Plaintiffs in Error

Vs.—

Commonwealth of Kentucky, ..Defendant in Error

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT

A number of years ago the plaintiff in error, The Provident Savings Life Assurance Society of New York, asked for and was granted authority by the then Insurance Commissioner of the State of Kentucky to transact the business of a life insurance company in said State, and continued up until January 1st, 1907, to comply with the laws of said State by making the statements and paying the tax on

premiums collected, as required by Section 4226 of the Kentucky Statutes, which section is as follows, to-wit:—

> "Every life insurance company, other than fraternal assessment life insurance companies, not organiezd under the laws of this State, but doing business therein, shall, on the first day of January in each year, or within thirty days thereafter, return to the Auditor of Public Accounts for deposit in the insurance department a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the 31st day of December, and no deductions shall be made for dividends, or since the last returns were made, on all premium receipts, which shall include single premiums, annuity premiums, and premiums received for renewals, revivals or reinstatement of policies, annual and periodical premiums, dividends applied for premiums and additions, and all other premuim payments received during the preceding year on all policies which have been written in, or on, the lives of residents of this State, or out of this State on business done in this State, and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred

dollars of said premiums as ascertained. Every life insurance company not organized under the laws of this State, but doing business therein on what is known as the industrial insurance plan, whereby weekly premiums are collected, shall at the same time make a return to the Auditor of Public Accounts for deposit in the Insurance Department, a statement under oath of all premiums recived on insurance written exclusively on the industrial plan, and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained. Any insurance company mentioned in this section doing insurance business other than on the industrial plan, shall make reports and pay into the State Treasury the taxes due thereon upon each report."

In January, 1907, the plaintiff in error attempted to withdraw from the State and so notified the Insurance Commissioner and ceased making the report or paying the tax as required by Section 4226 of the Kentucky Statutes and, while it is true that the plaintiff in error ceased writing any new business at that time, nevertheless it or its assignee, The Postal Life Insurance Company, has continued to collect the renewal premiums upon policies written by the plaintiff in error prior to 1907; and this action was instituted in the State Court by the Audi-

tor for the purpose of compelling the appellee to file a statement showing the exact amount of premiums collected since January 1st, 1907, and to pay the tax thereon as required by Section 4226 of the Kentucky Statutes, and the Kentucky Court of Appeals in its opinions rendered in this case (Record pages 7 and 20) held that the Company was liable for the tax upon all premiums received by it upon policies written by it while it was authorized to do business in Kentucky, and it is from that opinion that this appeal is prosecuted.

The plaintiff in error in its assignment of errors (Record page 26) assigns five reasons why the opinion of the Kentucky Court of Appeals should be reversed, but in its brief it has abandoned all save one, viz: the third, and therefore the defendant in error will only respond to the argument made by Counsel for plaintiff in error in the brief filed in this Court.

ARGUMENT

FIRST

This action is not brought under Section 4230a. and said section has never been relied upon by the defendant in error.

Counsel for plaintiff in error is mistaken when he

says in his brief (page 3) that the present suit to recover taxes was originally based on Section 4230a. As a matter of fact the State of Kentucky through its counsel has from the beginning of this action in the Franklin Circuit Court expressly disavowed any intention of holding the plaintiff in error under Section 4230a of the Statute, but took the position that Section 4230a was merely declaratory of what was already the law under Section 4226 and prescribed a penalty for failure to comply therewith, which Section 4226 didn't do, and the Court of Appeals of Kentucky sustained the contention of the State along that line and in its opinion (Record page 8) says:

> "The Legislature passed an act in 1906 which took effect in June, 1906, declaratory of this act and fixing a penalty for the violation thereof."

The opinion then proceeds to quote Section 4230a.

SECOND

The State of Kentucky is simply attempting to force the plaintiff in error to comply with a contract made at the time the plaintiff in error entered the State of Kentucky.

Counsel for defendant in error are tempted to say that they agree absolutely with Counsel for the

plaintiff in error in the statements of law made by him in his brief in this case, and only differ from him in the application thereof to the case at bar. The tax levied by the Kentucky Statutes, Section 4226, is a license tax imposed on foreign insurance companies for the privilege of doing business in Kentucky; and this Statute, whether numbered 4226 at that time or 4227, was in effect in the State of Kentucky at the time the plaintiff in error was admitted to do business therein by the then Insurance Commissioner of Kentucky, and the Court of Appeals of Kentucky by its opinions above referred to held that that statute impliedly became a part of the contract of the plaintiff in error with the State, and the State is now simply seeking an enforcement of that contract.

A State has the absolute right to prescribe the terms upon which a foreign corporation shall engage in business in that State.

Paul vs. Virginia—United States Supreme Court Reports, 8 Wall, 168, 19th Law Edition, 357.

Ducat vs. Chicago—United States Supreme Court Reports, 10 Wall, 410, 19th Law Edition, 972.

Fire Association of Philadelphia vs. New York—119 United States Supreme Court Reports, 110, 30th Law Edition, 342.

Hooper vs. State of California—155 United States Supreme Court Reports, 648, 39th Law Edition, 297.

People, etc., vs. Roberts—171 U. S., 658.

Counsel for plaintiff in error admits that the State has the right to prescribe the terms upon which a foreign corporation may do business within the State, but claims that the plaintiff in error in collecting the premiums since 1907 upon policies written in Kentucky prior to that time is not subject to this tax; but the State of Kentucky claims that when the plaintiff in error entered the State of Kentucky and begun to write life insurance therein, it agreed with the State that it would pay a tax of two per cent. upon all premiums received in this State or out of this State upon business done in this State, and the premiums received by it since 1907 are certainly received by it by virtue of the privilege granted it by the State of Kentucky prior to 1907, and in withdrawing from the State as it attempted to do in 1907, it did no more than give up its right to write new business within the State. It had a contract with the State that it could not break nor impair so long as it was receiving renewal premiums from any policyholder upon a policy written while it was authorized to do business in the State, and this Court in the recent case of Equit-

able Life Assurance Society of the United States vs. Pennsylvania, 238 U. S., 143, has held that the Equitable Life Assurance Society was liable to the State of Pennsylvania under a Statute similar to the Kentucky Statute and under circumstances identical with the case at bar; save that the Equitable Life Assurance Society was still writing new business in the State of Pennsylvania, but the premiums being received by it and which were in controversy in this action were being received outside of the State of Pennsylvania and upon policies written within the State of Pennsylvania.

THIRD

After an insurance company has applied for and been granted permission to insure the lives of citizens of a State and has agreed to pay the tax for such privilege, it cannot avoid that tax by attempting to withdraw from the State and cease writing new business.

Equitable Life Assurance Society vs. Pennsylvania, 238 U. S., 143.

We agree with Counsel for the plaintiff in error, "that the State of Kentucky cannot tax a license or privilege it does not grant" and to do so would be to deprive the corporation of its property without due process of law; but the State of Kentucky has already complied with its part of the

contract when it granted the plaintiff in error the license to come into Kentucky and insure the lives of its citizens and is still protecting the lives insured by the plaintiff in error, and the Company having come into Kentucky and having written that insurance, is simply now being called upon to comply with its contract and pay for the privilege that the State then granted it, and for which the Kentucky Court of Appeals says in its opinions in this case the plaintiff in error is liable. (Record pages 7 and 20.)

We think Counsel is in error when he states that the Provident Savings has done nothing since its withdrawal which can be construed as doing business in Kentucky sufficient to justify the exaction by the State of the privilege or license tax. During all that time the plaintiff in error has been insuring the lives of the residents of the State of Kentucky, it has been receiving the premiums upon these policies and it has been doing in Kentucky everything necessary to the carrying on of a life insurance business save the writing of new policies, and the State is asking nothing more from the Company than that it comply with its original contract with the State, and we think that this Court in the case of Equitable Life Assurance Society vs. Pennsylvania, 238 U. S.,

143, which case was only decided on the 15th of June, 1915, has decided that the plaintiff in error is liable for the tax, the Pennsylvania statute being almost identical with the Kentucky statute.

The decision of the Court of Appeals was based upon the above case which at that time had just been decided by the Supreme Court of Pennsylvania.

We agree with the Counsel for plaintiff in error that "Contracts for insurance being valid when they were made cannot now be interfered with nor the contractual relations between the parties disturbed," and certainly the State of Kentucky is not attempting to do this but is simply trying to enforce the contract made between the State and the plaintiff in error at the time it allowed the plaintiff to come into Kentucky and write insurance upon the lives of its citizens. The plaintiff in error had no right to write any insurance in Kentucky or to do any business therein except by virtue of the authority given it by the Insurance Commissioner at the time it entered the State after having complied with all the necessary requisites, and the premiums are now being received by virtue of the privilege then granted by the State.

Counsel for the plaintiff in error refers to the case of New York Life Insurance Company vs.

Head, 234th United States Supreme Court Reports, 149, but we don't think that case is applicable to the case at bar for the very patent reason that we are in no way attempting to effect the contracts of insurance entered into between the plaintiffs in error and residents of Kentucky, nor does the case of Allgeyer vs. Louisiana, 165th U. S., 578, relied upon by plaintiff in error, in any way effect the case at bar, for in that case the State of Louisiana was attempting to punish Allgeyer because he saw fit to apply for insurance in a company that was not authorized to do business in the State of Louisiana, all of the proceedings relative thereto being carried on by mail.

Counsel for defendant in error does not believe that this is a matter over which this Court can exercise any jurisdiction, that it is simply the construction of the Statutes of Kentucky and this Court is bound by the decision of the Kentucky Court of Appeals and that Court in its opinion (Record pages 7 and 20) holds that under the Statutes of the State in force at the time plaintiff in error entered the State, it is liable for this tax, and in holding this we cannot see where any provision of the Constitution of the United States is violated.

FOURTH

So far as the State of Kentucky in concerned, the Provident Savings Life Assurance Society is doing business in Kentucky as long as it has insured the lives of citizens of Kentucky under policies written while it was authorized to do business in Kentucky.

Connecticut Mutual Life Insurance Company vs. Spratley, 172nd U. S., 603.

Mutual Reserve Association vs. Phelps, 190 U. S., 157

In discussing this phase of the case Counsel desire to call the Court's attention to Section 631 of the Kentucky Statutes, which Statute was in force at the time the Provident Savings was admitted to do business in the State of Kentucky, which Statute is as follows, to-wit:—

> "Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its Board of Directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal

office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal Court, or shall institute any suit or proceeding against any citizen of this State in any Federal Court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in the State."

In the case of Connecticut Mutual Life Insurance Company vs. Spratley, 172nd U. S., 602, this Court says:

"We think the evidence in this case shows that the company was doing business in the State at the time of this service of process. From 1870 until 1894 it had done an active business throughout the State by its agents therein and had issued policies of insurance upon the lives of citizens of the State. How many policies had been issued does not appear. Its action in July, 1894, in assuming to withdraw from this State was simply a recall of its agents doing business therein, the giving of a notice to the State Insurance Commissioner and a refusal to take any new risks or to issue any new policies within the State. Its outstanding policies were not effected

thereby and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of service of process upon its agent."

In the case of Mutual Reserve Fund Life Insurance Company vs. Phelps, 190 U. S., 157, and which case is a Kentucky case, the Court cites with approval the case of Connecticut Mutual Life Insurance Company vs. Spratley, and says:

"Many questions were elaborately discussed by Counsel both orally and in brief, but we are of the opinion that the decision of two or three will dispose of the case. First, the service of the summons on the Insurance Commissioner was sufficient to bring the association into the State Court as a party defendant. It was stipulated between the parties that the outstanding policies existing between the association and citizens of Kentucky were continued in force after the action of the Insurance Commissioner on October 10th, 1899, and that on said policies the association had collected and was collecting dues, premiums and assessments. It was therefore doing business in the State."

Counsel for the Provident Savings says in his brief that the above two cases have since been directly qualified and limited in Hunter vs. Mutual

Reserve Insurance Company, 218 U. S., 573, but a careful reading of that case shows that the original suit brought in North Caroline was brought upon five policies, four of which had been issued not in the State of North Carolina but outside thereof, and the judgment which was rendered upon the policy which was written in North Carolina was not questioned, and Counsel for the State of Kentucky would not claim that now a citizen of another State would have the right to come into Kentucky and bring the Provident Savings before the Kentucky Courts upon a policy written in another State, and this Court in the opinion in the case of Hunter vs. Mutual Reserve Life Insurance Company clearly proves the distinction when it says:

> "The facts in the case at bar are different from the cited cases. The policies upon which the four judgments were recovered were not issued in North Carolina and not having been issued under the faith of its laws, are not entitled to their remedial sanction."

To say that the Provident Savings Life Assurance Society is not doing business in Kentucky, when it is receiving premiums upon policies written upon the lives of residents therein, when it is paying the losses as they accrue and is doing everything

necessary to the carrying on of a life insurance business save writing new business, would be the same thing as saying that any of the life insurance companies of this country would cease transacting the business of a life insurance company if its board of directors should decide to cease writing new policies; we don't believe this to be the case but believe that a life insurance company is doing the business of life insurance so long as it is insuring the life of a single person.

Counsel for the State of Kentucky cannot see that there is anything in this case other than the construction of a Statute of Kentucky, and that the Court of Appeals of Kentucky in construing it as it has, has not in any way infringed upon the rights granted to the Provident Savings under the Constitution of the United States; and we most respectfully ask an affirmance of the judgment of the Kentucky Court of Appeals.

JAMES GARNETT,
Attorney General.

JOHN A. JUDY,
Att'ys for State of Ky.

process provision of the Fourteenth Amendment applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts beyond the sphere of local control.

The continuance of insurance contracts on the lives of residents of the State already written by the company does not depend upon the consent of the State, nor has a State the power to treat the mere continuance of the obligations of existing policies of insurance held by residents as the transaction of local business justifying the imposition of a privilege tax in the absence of actual conduct of business within the limits of the State. *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143, distinguished.

The imposition of taxes on premiums collected on policies on residents of Kentucky in pursuance of the statutes of that State after the company has ceased to do business therein, *held*, in this case, to be an unconstitutional exercise of power under the due process provision of the Fourteenth Amendment.

160 Kentucky, 16, reversed.

THE facts, which involve the constitutionality of a statute of Kentucky taxing insurance companies on premiums paid outside the State on policies on lives of residents of the State and the determination of what constitutes doing business within the State by an insurance company, are stated in the opinion.

Mr. Wm. Marshall Bullitt, with whom *Mr. Charles C. Lockwood*, *Mr. Keith L. Bullitt*, and *Mr. Clarence C. Smith* were on the brief, for plaintiff in error:

The tax levied by Ky. Stat., § 4226, is a license tax imposed on foreign insurance companies for the privilege of doing business within Kentucky. *Northwestern Mut. Life* v. *James*, 138 Kentucky, 48, 52; *Southern B. & L. Assn.* v. *Norman*, 98 Kentucky, 294, 298; *Fidelity & Casualty Co.* v. *Louisville*, 106 Kentucky, 207, 211; *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143.

Kentucky Stat., § 4226, as construed by the Court of Appeals, violates the "due process" clause of the Fourteenth Amendment, because:

The State cannot tax a license or privilege which it

does not grant. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *New York* v. *Roberts*, 171 U. S. 658, 664; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 164; *Louisville Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396; *Delaware &c. R. R.* v. *Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 204; *Buck* v. *Beach*, 206 U. S. 392, 400.

The Insurance Company has done nothing, since its withdrawal, which can be construed as "doing business" in Kentucky so as to justify the exaction by that State of a privilege or license tax. *Hunter* v. *Mutual Reserve Ins. Co.*, 218 U. S. 573; *State* v. *Connecticut Mutual*, 106 Tennessee, 258.

The receipt by the Insurance Company of premiums in New York, after its withdrawal from Kentucky, was not by virtue of any privilege or license of Kentucky; and hence neither the premiums so received nor the privilege of receiving them are taxable by Kentucky.

The Company cannot be taxed for the act of the policy holders. *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 118 U. S. 283, 292; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 591.

The Company's act was in New York, not Kentucky. *Prewitt* v. *Security Mutual*, 119 Kentucky, 321; *Bedford* v. *Eastern B. & L. Assn.*, 181 U. S. 227; *People* v. *Miller*, 179 N. Y. 227; *State* v. *Conn. Mut. Life*, 106 Tennessee, 258.

The bare legal liability to Kentucky policy holders is not taxable by that State. *N. Y. Life* v. *Deer Lodge County*, 231 U. S. 495, 508; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 588; *N. Y. Life Ins. Co.* v. *Head*, 234 U. S. 149, 161.

Equitable Life Society v. *Pennsylvania*, 238 U. S. 143, can be distinguished and is relied on.

Mr. John A. Judy, with whom *Mr. James Garnett*, Attorney General of the State of Kentucky, was on the brief, for defendant in error:

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 328. Argued October 20, 21, 1915.—Decided November 15, 1915.

The state court, having placed its decision sustaining a tax on the ground that the corporation taxed was doing business within the State, and hence liable under the statute taxing corporations carrying on business, this court need only consider the question of whether the company was so transacting business as to render it subject to the taxing power of the State, and need not consider whether another statute under which the tax might have been levied was unconstitutional as impairing the obligation of the legislative contract under which the corporation entered the State.

Whether acts done by a corporation at the time to which a tax relates are of such a nature as to subject it to the local authority on the ground that such acts can only be done with the permission of the State is a Federal question, and this court has authority to review the decision of the state court in that respect.

The principle that taxation without jurisdiction violates the due

This action is not brought under § 4230a and said section has never been relied upon by the defendant in error.

The State of Kentucky is simply attempting to force the plaintiff in error to comply with a contract made at the time the plaintiff in error entered the State of Kentucky.

A State has the absolute right to prescribe the terms upon which a foreign corporation shall engage in business in that State. *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Fire Association* v. *New York*, 119 U. S. 110; *Hooper* v. *California*, 155 U. S. 648; *People &c.* v. *Roberts*, 171 U. S. 658; *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143.

After an insurance company has applied for and been granted permission to insure the lives of citizens of a State and has agreed to pay the tax for such privilege, it cannot avoid that tax by attempting to withdraw from the State and cease writing new business. *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143.

N. Y. Life Ins. Co. v. *Head*, 234 U. S. 149; *Allgeyer* v. *Louisiana*, 165 U. S. 578, do not apply to this case.

So far as the State of Kentucky is concerned, the Provident Savings Life Assurance Society is doing business in Kentucky as long as it has insured the lives of citizens of Kentucky under policies written while it was authorized to do business in Kentucky. *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 603; *Mutual Reserve Assn.* v. *Phelps*, 190 U. S. 157.

There is nothing in this case other than the construction of a Statute of Kentucky, and the highest court of that State in construing it as it has, has not in any way infringed upon any rights under the Constitution of the United States.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Provident Savings Life Assurance Society, a New York corporation, transacted business in Kentucky prior

to January 1, 1907, and paid the annual license tax of two per cent. on premiums. Kentucky Statutes, § 4226. This suit was brought by the Commonwealth to recover the tax on premiums received in the years 1907 to 1911, inclusive. The Company answered, denying liability upon the ground that on January 1, 1907, it had entirely ceased to do business in Kentucky and that all premiums received after that date on policies previously issued in Kentucky were received in New York.

Prior to the amendments made in the year 1906, § 4226 of the Kentucky Statutes provided as follows:

"SEC. 4226. Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this State, but doing business therein, shall on the first day of July in each year, or thirty days thereafter, return to the Auditor of Public Accounts for deposit in the Insurance Department, a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the 30th of June last preceding, or since the last returns were made and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained." Kentucky Statutes, ed. 1903.

This section was amended in 1906 by making the fiscal year to end on December thirty-first instead of June thirtieth, by prohibiting deductions for dividends, and by amplifying the description of premium receipts. (See *Mutual Benefit Life Insurance Co.* v. *Commonwealth*, 128 Kentucky, 174; *Northwestern Mutual Life Insurance Co.* v. *James*, 138 Kentucky, 48.) The amended section was as follows:

"SEC. 4226. Every life insurance company, other than fraternal assessment life insurance companies, not or-

ganized under the laws of this State, but doing business therein, shall, on the first day of January in each year, or within thirty days thereafter, return to the Auditor of Public Accounts for deposit in the insurance department a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the 31st day of December, and no deduction shall be made for dividends, or since the last returns were made, on all premium receipts, which shall include single premiums, annuity premiums, and premiums received for renewal, revival or reinstatement of policies, annual and periodical premiums, dividends applied for premiums and additions, and all other premium payments received during the preceding year on all policies which have been written in, or on, the lives of residents of this State, or out of this State on business done in this State, and shall at the same time pay into the State Treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained."

In 1906, the legislature added the following provision, which is found in § 4230a of the Kentucky Statutes:

"SEC. 4230a. (2.) Any insurance company that has been authorized to transact business in this State shall continue to make the reports required herein as long as it collects any premiums as provided for herein, and shall pay taxes thereon, even after it has voluntarily ceased to write insurance in the State or has withdrawn therefrom, or its license is suspended or revoked by the Insurance Commissioner, and for failure to make report of the premiums collected and pay the taxes due thereon, shall be fined five hundred dollars for such offense."

It does not appear that the changes in § 4226 were involved in the present controversy as there was no dispute as to the amount of the premiums received in the years

in question, or as to deductions. But the Company insisted that § 4230a was invalid under the contract clause of the Federal Constitution (Art. I, § 10) and also that the imposition of the tax on premiums received after the Company had withdrawn from the State was contrary to the due process clause of the Fourteenth Amendment. Demurrer to the answer was overruled, the motion of the defendant that the demurrer relate back to the petition was sustained, and the petition was dismissed. Judgment to this effect was reversed by the Court of Appeals of Kentucky and the cause was remanded with direction to sustain the demurrer to the answer and for further proceedings consistent with the opinion of the appellate court. *Commonwealth* v. *Provident Savings*, 155 Kentucky, 197.

The Company then amended its answer, renewing its constitutional objections. Enlarging the statement of facts, it averred that on January 1, 1907, it had withdrawn all its agents from Kentucky, had closed all its offices and had ceased to solicit or write insurance, or maintain any agent, or collect any premiums, within that jurisdiction. On January 1, 1911, the Postal Life Insurance Company, a New York corporation, had reinsured all the business of the defendant. Between January 1, 1907, and January 1, 1911, all premiums paid to the defendant upon policies theretofore issued in Kentucky were paid to it at its home office in New York City through the mail. The Postal Life Insurance Company did not have at any time an office or agents in Kentucky or transact any business in that State, and all premiums that it received were paid to it in New York through the mail.

Demurrer to the amended answer was sustained and judgment was entered in favor of the Commonwealth. The Court of Appeals affirmed the judgment (*Provident Savings* v. *Commonwealth*, 160 Kentucky, 16) and this writ of error has been sued out.

The Court of Appeals did not put its decision upon the provision of § 4230a. This provision, it was said, was declaratory of the existing law, and the Company's obligation was taken to be defined by § 4226. The tax was a license tax (*Northwestern Mutual Life Insurance Co.* v. *James*, 138 Kentucky, 48, 52), payable annually, and by the express terms of the act was payable by the foreign life insurance corporations 'doing business' within the State. Both parties agree that it was imposed "for the privilege of doing business in Kentucky." The State contends that it is seeking to enforce an agreement which by implication from the statutory provision the Company must be deemed to have made when it entered the State. But there is no suggestion that it had ever been decided prior to this litigation that the described companies were bound under § 4226 to pay the annual tax irrespective of the continued transaction of business within the jurisdiction during the years to which the tax related. Nor, as we understand it, was the statute so construed in the present case. It is true that the court stated in its opinion that the Company on being admitted to the State agreed to pay the tax imposed by § 4226 and that the Company did not have 'the right and power to revoke this agreement as it attempted to do the first of January, 1907.' But, immediately following this statement, the court proceeded to hold with an explicitness which does not permit us to doubt the basis of its decision that the Company was liable to the tax because it continued, despite the asserted withdrawal, to do business within the State during the period for which the tax was sought to be collected. If the tax in controversy was demanded by the State and was enforced upon the ground that it was payable for a privilege which the Company admittedly enjoyed in prior years, it was manifestly immaterial to inquire whether or not the Company was continuing to transact a local business during the succeeding period. In

that aspect, the question would be whether with respect to the alleged agreement the decision could be deemed to be one which in reality gave effect to the subsequent legislation (of 1906) and involved the application of the contract clause. If, however, the tax now sought to be imposed was for a privilege exercised during the years to which the tax related it would be necessary to find that the Company was doing business within the State at that time. Evidently in view of this necessity, the Court of Appeals said upon the first appeal:

"Counsel for appellee mainly rests its case upon the definition of 'what is doing business?' Is a life insurance company doing business in a State only so long as it is writing new business? If this is true, then the appellant has no case. However, counsel for appellant insists that an insurance company is doing business in this State in the meaning of the statute so long as it is insuring the lives of residents of this State and furnishing protection to the beneficiaries named in the policies against loss from death of the insured, this being the chief business for which insurance companies are organized, and we are unable to see how the court" (referring to the court of first instance) "held, that a company collecting premiums on policies issued in this State, when it was authorized to do business in this State, can be said 'not to be doing business,' when it was still insuring those same lives and collecting the premiums upon the policies." 155 Kentucky, 197, 201.

Upon the second appeal the court merely referred to its ruling on the first appeal and to other cases (*Commonwealth* v. *Illinois Life Insurance Co.*, 159 Kentucky, 589; *Commonwealth* v. *Washington Life Insurance Co.*, 159 Kentucky, 581) in which that decision had been followed without further discussion of grounds. We do not, therefore, find it necessary to consider the applicability of the contract clause of the Federal Constitution, inasmuch as it

appears that the decision turned upon the conclusion that the Company continued after January 1, 1907, to transact business within the jurisdiction. Otherwise, according to the final ruling, the State would have had 'no case.'

The present case thus differs from that of *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143. It was not disputed that the Equitable Company was actually doing business in Pennsylvania. See *Commonwealth* v. *Equitable Life Assurance Society*, 239 Pa. St. 288, 293. The question was as to the permissible measure of a tax exacted for a privilege admittedly exercised. As this court said: "The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax." 238 U. S. 147. In the present case it is not the measure of the tax for doing business, but the very basis of the tax—that is, whether the Company was doing business within the State—that is in controversy.

Assuming this to be the point in dispute, the question at once arises whether the matter is reviewable in this court. And we cannot doubt that the question whether the State is taxing a foreign corporation for a privilege not granted, that is, whether the acts done by the corporation at the time to which the tax relates are of such a nature as to subject it to the local authority upon the ground that it is doing acts which can only be done with the permission of that authority, must be regarded as a Federal question. Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment (*Louisville & Jefferson Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R.* v. *Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 209); and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts with respect to which the State exercises the taxing

power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked.

It is not controverted that the Company, at the time in question, was not soliciting insurance or collecting moneys in that State. Further, it had no offices or agents in Kentucky. Upon the averments which stand admitted in the record it must be assumed that it was not performing any acts within the jurisdiction of Kentucky. It had sought to withdraw itself completely from the State. The conclusion that it continued to do business within the State, notwithstanding this withdrawal, appears to be based solely upon the fact that it continued to be bound to policy holders resident in Kentucky under policies previously issued in that State and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the Company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the State's consent. But the continuance of the contracts of insurance already written by the Company was not dependent on the consent of the State. It is true that acts might be done within the State in connection with such policies, as for example in maintaining an office or agents although new insurance was not written or solicited, which could be considered to amount to the continuance of a local business. In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written. These policies are contracts already made; the State cannot de-

stroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the State's control. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227, 241; *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, 163.

The defendant in error relies upon expressions contained in the opinions in *Connecticut Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602, 610, and *Mutual Reserve Fund Life Association* v. *Phelps*, 190 U. S. 147, 157,—expressions which (in a full review of these cases and others) were explained and limited in *Hunter* v. *Mutual Reserve Life Insurance Company*, 218 U. S. 573. The cases cited related to the validity of the service of process upon foreign corporations. And it was held that a foreign insurance corporation which had transacted business within the jurisdiction of a State continued, notwithstanding its withdrawal from the State, to be subject to service of process within the State, in actions arising out of the business so transacted, where the service was made in accordance with the conditions upon which the business was permitted to be done. Thus, in the *Phelps Case*, service was made in Kentucky under § 631 of the Kentucky Statutes providing for service of process upon the commissioner of insurance. The Court of Appeals of Kentucky had decided that the withdrawal of the Company from the State did not terminate the statutory agency for the acceptance of service which had been created as a condition of the Company's admission; the granted authority continued with respect to the business transacted. *Home Benefit Society* v. *Muehl*, 109 Kentucky, 479, 484; *Germania Insurance Co.* v. *Ashby*, 112 Kentucky, 303, 307, 308. But a distinction obtains when the question is whether the mere continuance of the obligation to resident

policy holders under the existing policies can be regarded as constituting in itself the transaction of a local business. This distinction was made clear in the *Hunter Case*. There, the action was brought in New York against an insurance company upon judgments which had been obtained against the company in North Carolina. The question turned upon the validity of the service of process in the North Carolina actions. The insurance company, a New York corporation, had been admitted to do business in North Carolina and had actually transacted business in that State prior to the year 1899. The legislature of North Carolina enacted a statute providing that any corporation desiring to do business in the State after June 1, 1899, must become a domestic corporation. Severe penalties were prescribed for violation. Thereupon, the board of directors of the company passed a resolution 'to withdraw from the State and to dispense with and terminate the services of all its agents.' The agents were withdrawn accordingly and the premiums on policies theretofore issued were subsequently 'remitted by mail to the home office of the company in New York, where the policies and premiums were payable.' There were in that case, outside of this course of business, four transactions within the State after the withdrawal, which were of minor importance and of isolated character. The actions in question, in the North Carolina court, were not brought upon policies issued in North Carolina, and consequently it was sought to sustain the jurisdiction of the court upon the ground that despite the withdrawal of the company, it was still doing business within the State. The court expressly overruled this contention. The court said: "It" (the company) "was given the choice to become a domestic corporation or go out of the State. It chose to go out of the State, and adopted the only way it could to do so. We think such course was open to it and we see no reason to question its good faith." 218 U. S. 583.

It was recognized that the authority which the Company had given with respect to service of process continued in force as to actions growing out of business which had been transacted within the State. But the continuance of the authority to accept service of process resulted from the nature and construction of that authority, and the view that the mere continuance of the obligation of contracts previously made within the State constituted a continuance of 'doing business' within the State so as to give the Company a 'domicil of business' and thus subject it to the State's jurisdiction was distinctly disapproved.

In the present case, the question is not, as in the *Phelps Case*, one as to the right to revoke the agency created under § 631 of the Kentucky Statutes with respect to the service of process in actions arising out of transactions which had taken place within the State. It is as to the power of the State to treat the mere continuance of the obligation of the existing policies held by resident policy holders as the transaction of a local business justifying the imposition of an annual privilege tax in the absence of the actual conduct of business within the limits of the State.

We cannot conclude that the State has this power, and in this view the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.